

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY, a Corpo-
ration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 24 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

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Appellee.

On appeal from the United States District Court
for the Northern District of California, Southern
Division.

Trial before the Honorable Louis E. Goodman,
District Judge, sitting without jury.

In the United States District Court for the Northern District of California, Southern Division,
in Admiralty

No. 24608-G

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LONGSHOREMEN'S ADMINISTRATOR'S
LIBEL IN PERSONAM

(For damages under the Suits in Admiralty Act and
the Public Vessels Act)

To the Honorable the Judges of the Above-Entitled
Court:

The libel of Edgar E. Reite, personal representative and administrator of the estate of John Henry Mitchell, deceased longshoreman, against the United States of America and the United States Naval vessel PA-164, owned, managed, navigated and operated by said United States of America, and against

all persons lawfully intervening in their interests, in a cause of action for damages under the Public Vessels Act and the Suits in Admiralty Act, civil and maritime, alleges: [1*]

I.

That the United States vessel, PA-164, is a vessel of United States registry and now is and during all of the times herein mentioned was owned, operated, managed and navigated by the United States of America as a Naval vessel, and was and is a public vessel of the United States.

II.

That libelant is a resident of the City and County of San Francisco, State of California, and resides within the jurisdiction of the above-entitled Court.

III.

That at the time of the acts of which complaint is herein made, the said PA-164 was within the jurisdiction of the above-entitled Court, and at the time of the filing of this libel is, or soon will be, within the jurisdiction of the above-entitled Court.

IV.

That libelant brings and maintains this action pursuant to and under the provisions of the Public Vessels Act, 46 USCA Sections 781 through 790; and the Suits in Admiralty Act; 46 USCA Sections 741 and 752.

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That the respondent, United States of America, maintains an office and principal place of business in connection with the matters of which complaint is herein made in the City and County of San Francisco, State of California, and said respondent is within the jurisdiction of the above-entitled Court.

VI.

That heretofore, to wit, on May 31, 1946, libelant was appointed administrator of the estate of John Henry Mitchell, deceased, by order of the Superior Court of the State of California in and for the County of Alameda in action No. 94842 Probate. That on said day Letters of Administration were issued to libelant by said court in said action, and libelant since said date has been and now is the duly qualified and acting administrator of the estate of John Henry Mitchell, deceased. That libelant brings and maintains this action for and on behalf and benefit of the sole and only surviving heir at law of the deceased, namely, Ozrie Mitchell, his widow, who was dependent upon the deceased for her support.

VII.

That on or about May 28, 1945, at or about the hour of 7:30 a.m., the said vessel PA-164 was docked at Pier 18, San Francisco, California. That at said time and place the deceased John Henry Mitchell was employed by the Arrow Stevedoring Company as a stevedore, and was working and employed

aboard said vessel within the course and scope of said employment, and was a business invitee of respondent aboard said vessel. That at said time and place and in company with other stevedores, the deceased was in the hold of the No. 4 hatch where he was engaged in working cargo. That at said time and place a hatch cover or tank top fell from the top of said hatch into the said hold and fell upon the said John Henry Mitchell, causing him severe and grievous bodily injuries which resulted in his death on May 28, 1945. That respondent at said time and place kept and maintained said vessel, her gear, appurtenances and appliances and the said #4 hatch in an unseaworthy condition in the following respects: (1) respondent failed to provide a suitable means for locking and securing the said hatch cover or tank top so that it would not fall into said hold, as aforesaid; (2) respondent left said hatch cover or tank top in a dangerous position, namely, in an upright position above said hatch, and because of the construction of said hatch cover or tank top said upright position was the only way in which it could be left, and thereby the construction of said hatch [3] cover or tank top invited or caused the accident which occurred; (3) respondent failed to provide a suitable and proper hook, lock or other device to secure said tank top or hatch cover, so that it would not fall into said hold as occurred.

VIII.

That respondent was negligent in that respondent failed to safely and properly secure the said tank top or hatch cover so that it would not fall into said

hold, and negligently failed to provide hooks, locks or other devices for the purpose of securing said tank top or hatch cover, and negligently and carelessly left said tank top or hatch cover in an upright position above said hold so that the said tank top or hatch cover was in a position where it could readily and it did fall into said hold, causing the accident which resulted in the death of John Henry Mitchell, as herein described.

IX.

That at the time of his death the deceased was of the age of thirty-five years and had a life expectancy of 33 years. That the deceased was in good health and was earning wages in the approximate sum of \$3,000 per year. That as a result of the negligence and carelessness of respondents and the unseaworthiness of said vessel, as hereinabove alleged, which caused the death of the deceased, Ozrie Mitchell, the widow of the deceased, has been wrongfully denied and deprived of the financial support, care, maintenance, comfort, society, and companionship of the said John Henry Mitchell, all to her general damage in the sum of \$75,000.

X.

That the said Ozrie Mitchell, widow of said deceased, has incurred special damage by way of funeral bills for the burial of said deceased in the amount of approximately \$500, which special damage has been caused by the negligence and carelessness of respondent herein. [4]

XI.

That all and singular, the allegations herein are true and are within the admiralty and maritime jurisdiction of the above-entitled Court.

Wherefore libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against respondent and that respondent be required to appear and answer upon oath all and singular the matters aforesaid pursuant to the statutes of the United States in matters of this kind, and that this Honorable Court may be pleased to decree the payment by respondent of the sum of \$75,500, plus costs of suit herein and for such other and further relief as is meet and just in the premises.

Dated: June 10, 1946.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER &
EDISES,
HERBERT RESNER,
Proctors for Libelant. [5]

State of California,
City and County of San Francisco—ss.

Ed Reite, being first duly sworn, deposes and says:

That he is the person named in the within and foregoing libel; that he has read said libel and knows the contents thereof; that same is true of his own

knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

EDGAR E. REITE.

Subscribed and sworn to before me this 10th day of June, 1946.

[Seal] ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 11, 1948. [6]

[Title of District Court and Cause.]

ANSWER

Now comes the respondent, United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, and answering the above captioned libel respectfully alleges:

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent has no information or belief upon the allegations of Article II and therefore denies said allegations.

III.

Respondent admits the allegations of Article III.

IV.

As to the allegations of Article IV respondent leaves matters of law to the Court.

V.

Respondent admits the allegations of Article V.

VI.

Respondent has insufficient information or belief to enable it to answer the allegations of Article VI and demands strict proof thereof.

VII.

As to the allegations of Article VII respondent admits that the deceased John Henry Mitchell was upon said vessel as a stevedore in the employ of the Arrow Stevedoring Company, in the course of his said employment and that at said time and place he received some injury from a falling hatch cover, or tank top. Respondent does not have sufficient information or belief regarding the death of said John Henry Mitchell and demands strict proof thereof. Respondent denies the remaining allegations of said Article VII.

VIII.

As to the allegations set out in Article VIII respondent denies that any injuries sustained by the deceased as in said Article alleged, or at all, were proximately, or at all, caused by the alleged, or any negligence and/or carelessness of the respondent, or of its officers, or agents, or servants, or employees in the particulars alleged or in any matters at all. Denies that respondent or its officers, or agents, or servants or employees were negligent and/or careless in or about any of the matters alleged in regard to the safety and proper security of said tank top or hatch cover, in the providing of hooks, locks or

other devices for the purpose of securing said tank top or hatch cover, or in leaving said tank top or hatch cover in an upright position, or any position above said hold, so that it could readily fall and/or that it did fall into said hold.

In this connection respondent alleges that at all times in said article mentioned the said tank top or hatch cover was provided with a suitable and proper locking device consisting of locking hooks, chains and locking pins designed for, and proper and suitable for the purpose of holding said tank top or hatch cover securely when the same was in an upright position, and that if properly used said devices were sufficient to and would have prevented said tank top or hatch cover from falling, or being caused to fall by any normal operation of loading or unloading said vessel. Respondent further alleges that at no time mentioned in said libel was said tank top or hatch cover warped or defective, but was at all times in such good working condition that it could have been placed in the proper position for engaging with the hook chains and pins before mentioned, provided for the purpose of securing said tank top or hatch cover against falling; that at all times mentioned the aforesaid devices for holding said tank top or hatch cover in place were provided with proper locking pins; that at all times in said Article mentioned the deceased was by respondent afforded a safe place to perform his work as stevedore; that at all times mentioned in said Article the said tank top or hatch cover was opened, and left open by the said Arrow Stevedoring Company, its

officers, agents, servants [9] and employees; that at no time in said Article mentioned did respondent, its officers, or agents, or servants, or employees or members of the crew of said vessel have notice of, or reason to believe, that the said tank top or hatch cover was insecure in the matters alleged or at all.

IX.

Respondent has insufficient information or belief regarding the age, life expectancy, health and earning capacity of deceased and demands strict proof thereof. Denies the remaining allegations of said Article.

X.

Respondent denies the allegations of Article X.

XI.

Article XI alleges matters for the Court to decide. Further Answering and as a First Separate and Distinct Defense to Said Libel:

I.

Respondent alleges upon information and belief that any injuries to, or damages suffered by libelant were sustained solely by libelant's own negligence and by the negligence of those exercising supervision and control over said libelant in the premises in said libel set forth. Respondent in this connection alleges that such damages and injuries if any there were, were not caused or contributed to in any manner by any fault or negligence of respondent, its servants, agents or representatives.

Further Answering, and as a Second Separate and Distinct Defense to Said Libel: [10]

Respondent alleges that at the time and place in said libel set forth libelant was not an employee of the United States through the War Shipping Administration or otherwise, but on the contrary was an employee of the said Arrow Stevedoring Company working on board the Naval Vessel PA-164, a public vessel of the United States, and that the damages claimed by libelant were not caused by said public vessel but on the contrary were as respondent is informed caused by the falling of a tank top or hatch cover on board said public vessel not employed as a merchant vessel; and that the cause of action stated by the libel is not one respecting which the United States has consented to be sued under the Public Vessels Act, 1925 (46 USC 781 et seq.), the War Shipping Administration (Clarification) Act, 1943, sometimes referred to as Public Law 17 (50 USC appx. 1291), the Suits in Admiralty Act, 1920 (46 USC 741 et seq.) or under any other provision of law whatsoever.

Wherefore respondent prays that the libel may be dismissed with costs.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ WILLIAM E. LICKING,

Asst. United States Attorney.

/s/ C. ELMER COLLETT,

Asst. United States Attorney,

Proctors for Respondent,

United States of America.

[Endorsed]: Filed Oct. 1, 1946. [11]

[Title of District Court and Cause.]

PETITION TO BRING IN THIRD PARTY
UNDER RULE 56

To the Honorable, the Judges of the Above-Entitled
Court Sitting in Admiralty:

The Petition of The United States of America,
respondent herein, respectfully shows:

I.

Upon information and belief that at all times hereinafter mentioned the Arrow Stevedoring Company, a corporation, (hereinafter called "said Company") was and now is a corporation organized and existing under the laws of the State of California and has a principal place of business in the City and County of San Francisco, California, within the jurisdiction of this Court.

II.

That on or about June 11, 1946, Edgar E. Reite as personal representative and administrator of the estate of John Henry Mitchell, deceased, filed his libel in personam now pending herein against petitioner, The United States of America, wherein libelant claims the sum of \$75,000.00, together with special damages for personal injuries. A copy of said libel is hereto attached, marked Exhibit "A" and by reference made a part hereof;

III.

That on or about June 30, 1944, the said Company entered into a written contract with petitioner,

the United States of America, which said contract, with changes herein immaterial [12] was at all times mentioned in said libel, and now is in full force and effect, said contract being designated N220S-9750A; that by the terms of said contract said Company agreed to furnish and perform the necessary services and to furnish the necessary labor for loading and stevedoring certain vessels and to indemnify and save harmless the United States against all loss or damage in connection therewith; that at the time of the alleged occurrence of the injuries alleged in said libel said Company was engaged in furnishing labor and performing services under the terms of said contract on board said vessel and that the said Company, its agents, servants and employees were in sole and exclusive control of the hatch openings and hatch covers on board said vessel about which libelant and other members of the stevedore gang were working, and of all portions of said vessel, its gear and appurtenances connected with the happening of the alleged injuries to libelant in said libel described.

IV.

Petitioner further alleges, upon information and belief that any injuries sustained by libelant on board said vessel, if any there were, were the consequence of his having been struck by a falling hatch cover while he was working on said vessel in the course of his employment by said Company in its performance of the contract aforesaid, and that said libelant was injured solely as a direct and prox-

mate result of the careless, reckless and negligent manner in which said hatch cover had been placed, arranged, secured and maintained by said Company, its servants, agents and employees, and by the improper, careless and negligent manner in which said Company, its servants, agents and employees conducted themselves and their activities in the vicinity thereof of said vessel.

V.

That if petitioner is under any liability by reason of [13] any of the matters alleged in said libel, such liability was solely and proximately caused by the fault and negligence of said Company, its servants, agents and employees in respect of the matters in paragraph IV hereof set forth; by reason whereof any and all such liability should be borne by said Company and not by petitioner, and that said Company is wholly or partially liable to petitioner by way of indemnity or contribution, or other remedy over or otherwise, and that said Company should be proceeded against by libelant directly and in the place and stead of this petitioner.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays:

1. That process in due form of law may issue against said Arrow Stevedoring Company citing it

to appear and answer all and singular the matters of this petition and of the libel herewith exhibited.

2. That said Arrow Stevedoring Company may be proceeded against as if originally made a party herein, and that if the Court shall find that libelant is entitled to a decree, then that said decree be entered against said Arrow Stevedoring Company, and that the Court may dismiss said libel as against this petitioner with costs.

3. That petitioner may have such other and further relief and redress as the Court is competent to give in the premises.

/s/ FRANK J. HENNESSY,
United States Attorney. [14]

/s/ WILLIAM E. LICKING,
Asst. United States Attorney.

/s/ C. ELMER COLLETT,
Asst. United States Attorney,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Oct. 1, 1946. [15]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24608-G

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL, Deceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

and

ARROW STEVEDORING COMPANY, a Corpora-
tion,

Respondent-Impleaded.

ANSWER OF ARROW STEVEDORING COM-
PANY, A CORPORATION, TO PETITION
OF THE UNITED STATES OF AMERICA
AND ANSWER TO LIBEL

Comes now Arrow Stevedoring Company, a cor-
poration, respondent-impleaded herein, and answer-
ing the petition and libel, alleges as follows:

ANSWER TO PETITION OF THE UNITED
STATES OF AMERICA

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II, save and
except the reference made to the libel therein, and
this respondent-impleaded refers to its answer to
libel hereinafter set forth. [16]

III.

Answering the allegations of Article III, respondent-impleaded alleges that there was in effect a contract between the United States of America and Arrow Stevedoring Company, said contract being designated as "N220-S-9750A," and save and except as hereinabove admitted and alleged, denies the allegations of Article III.

IV.

Answering the allegations of Article IV, respondent-impleaded alleges that libelant was injured by being struck by a hatch cover while working on the vessel in the course of his employment by Arrow Stevedoring Company, respondent-impleaded herein, and save and except as hereinabove admitted and alleged, denies the allegations of Article IV.

V.

Answering the allegations of Article V, respondent-impleaded alleges that it is under no liability by reason of any of the matters or things alleged in the petition of the United States of America, or said libel herein, and placing its denial upon said ground, denies the allegations contained in Article V, insofar as they concern, refer to or charge this respondent-impleaded.

VI.

Answering the allegations of Article VI, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled court.

VII.

Further answering the allegations of said petition of the United States of America filed herein, this respondent-impleaded alleges that the death of John Henry Mitchell was not caused by any fault, negligence or omissions on the part of its agents, servants or employees; that said respondent- [17] impleaded has paid to heirs and personal representatives of John Henry Mitchell, deceased, by way of indemnity payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901, the sum of \$1,282.41.

ANSWER TO LIBEL

Answering the allegations of the libel herein which said libel has been attached to the petition of the United States of America and made a part thereof, this respondent-impleaded does allege as follows:

I.

Admits the allegations of Article I.

II.

Answering the allegations of Article II, respondent-impleaded has no information concerning the same and demands strict proof thereof.

III.

Answering the allegations of Article III, respondent-impleaded admits that USS "Edgecomb," also known as PA-164, was lying in the navigable waters of the United States of America, to wit: San Francisco Bay, at the time of the happening of the accident to John Henry Mitchell, deceased.

IV.

Answering the allegations of Article IV, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled Court.

V.

Admits the allegations of Article V.

VI.

Answering the allegations of Article VI, respondent-impleaded has no information as to whether said deceased, John Henry Mitchell, left heirs at law other than Ozrie Mitchell, [18] his widow, and demands strict proof thereof.

VII.

Answering the allegations of Article VII, respondent-impleaded alleges that John Henry Mitchell, deceased, met his death while in the employ of respondent-impleaded in the capacity of a stevedore aboard said vessel, and save and except as hereinabove admitted and alleged, respondent-impleaded has no information concerning the same and demands strict proof thereof.

VIII.

Answering the allegations of Article VIII, this respondent-impleaded admits that respondent, United States of America, was negligent in and about the matters and things set forth in said article.

IX.

Answering the allegations of Article IX, respondent-impleaded has no information concerning the life expectancy or the earning capacity of said

deceased, and demands strict proof thereof, and denies that the death of John Henry Mitchell was caused by any carelessness or negligence of this respondent-impleaded, and further denies that Ozrie Mitchell, widow of deceased, has been damaged in the sum of \$75,000, or any other sum or sums or otherwise or at all insofar as this respondent-impleaded is concerned.

X.

Denies the allegations of Article X.

XI.

Answering the allegations of Article XI, respondent-impleaded leaves open all questions of jurisdiction to the above-entitled Court.

XII.

Further answering allegations of said libel, this respondent-impleaded alleges that the death of John Henry Mitchell [19] was not caused by any fault, negligence or omissions on the part of its agents, servants or employees; that respondent-impleaded has paid to the heirs at law of John Henry Mitchell, deceased, the sum of \$1,282.41 as and for indemnity payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901.

Wherefore, respondent-impleaded prays that said petition be dismissed and that if any recovery be had by libellant against respondent, United States of America, this respondent-impleaded be awarded the sum of indemnity payments paid pursuant to

the Longshoremen's and Harbor Workers' Compensation Act, and that it have its costs of suit herein incurred.

JOHN H. BLACK,
EDWARD R. KAY,

Proctors for Arrow Stevedoring Company, a Corporation. [20]

State of California,
City and County of San Francisco—ss.

Fred John Foster, being first duly sworn, deposes and says:

That he is an officer of Arrow Stevedoring Company, a corporation, to wit: Secretary: that as such officer he is empowered to make this verification; that he has read the foregoing answer to Petition of the United States of America and Answer to Libel, and knows the contents thereof; that the same is true and correct of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

FRED JOHN FOSTER.

Subscribed and sworn to before me this 21st day of January, 1947.

[Seal] EMMA L. MacHUGH,

Notary Public in and for the City and County of
Francisco, State of California.

My commission expires Jan. 15, 1948.

[Endorsed]: Filed Jan. 23, 1947.

[Title of District Court and Cause.]

ORDER FOR DECREE

Let a decree enter in favor of libelant and against the United States for the sum of \$18,000.00 damages and in favor of interpleaded respondent, Arrow Stevedoring Company, a corporation.

Counsel will prepare and present findings and decree in due course.

Dated: June 10, 1947.

MICHAEL J. ROCHE,

United States District Judge.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed June 10, 1947.

[Title of District Court and Cause.]

IMPLEADED RESPONDENT'S PROPOSED
FINDINGS OF FACT AND CONCLUSION
OF LAW AND DECREE

This cause having duly come on for trial before the court on the 11th and 24th days of February, 1947, and the 18th day of April, 1947, and the parties having appeared by their respective proctors, and evidence having been received, and the matter having been duly submitted to the Court for determination, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. On May 28, 1945, the decedent, John Henry Mitchell, was employed as a stevedore by the impleaded respondent Arrow Stevedoring Company, and on said day he and five other stevedores were working at the level of the third deck in the No. 4 port hatch of the U.S.S. Edgecombe.

2. Said Arrow Stevedoring Company was engaged in unloading boxes of empty artillery shells through said hatch under a contract with the United States as the owner of the vessel.

3. The decedent and said other five stevedores boarded said vessel about 7 a.m. on said day and went below to the third deck in said hatch for the purpose of unloading said shells.

4. Said shells were in the lower compartment of said hatch, and completely filled the same.

5. Said lower compartment had a square hatch cover which was hinged on the inboard side, and which weighed about 3500 pounds.

6. A gang of stevedores employed by Arrow Stevedoring Company had worked in the said No. 4 port hatch up to 6:00 a.m. on the morning of May 28, 1945, but none of the said gang or any other employee of Arrow Stevedoring Company was employed in and about the said hatch between 6:00 on May 28, 1945, until 7:00 a.m. on May 28, 1945, when the said John Henry Mitchell, deceased, and his fellow stevedores commenced to work in the said hatch. [23]

7. The decedent and two other stevedores stood on top of said cargo for the purpose of commencing said work of unloading said hatch and a cargo board was lowered through the hatch by means of a winch and boom. Said cargo was lowered carefully and neither it nor the cable or falls struck the hatch cover while said cargo board was being lowered. After the cargo board came to rest on top of the cargo, said hatch cover suddenly fell shut and crushed the decedent beneath it and thereby inflicted upon him fatal injuries.

8. The hatch cover which fell was at least 8 feet measured athwartship and about 14 feet long measured fore and aft. Two dogs were provided for the purpose of securing and preventing the hatch cover from falling shut when it stood in vertical or open position. One dog was attached to the forward bulkhead of the hatch, and the other dog was attached to the aft bulkhead of the hatch. Each dog swung on a shaft which extended in a fore and aft direction from the bulkhead. When the hatch cover was raised to a vertical position, each dog was intended to swing down upon the upturned edge of the hatch cover, so that the hook on the end of the dog would extend beyond the edge of the cover and down a few inches from the top edge of the cover so as to grip it and hold it from falling. Each dog had a hole in its side, and, when the dog was gripping the hatch cover, it was intended that a metal locking pin would be inserted through said hole and into a hole in the bulkhead, so as to lock the dog and prevent the

same from raising and thereby releasing its grip on the hatch cover. A locking pin for the forward dog was attached to the bulkhead by means of a chain near the dog.

9. At the time of said accident the aft dog, that is to say, the dog attached to the aft bulkhead, was defective, in that the same did not extend far enough to permit the hook [24] on the end thereof to reach past the edge of the cover so as to grip the same when the cover was standing in its normal open position. Instead, the hook would rest on the upturned edge of the hatch cover, in which position it could not grip the cover and could not and did not prevent the cover from falling.

10. At the time of the accident the forward dog, that is, the dog attached to the forward bulkhead was defective, in that the hook on said dog was worn or rounded and said dog would raise by itself, so as to release its hold or grip on said hatch cover.

11. At the time of said accident the forward dog and its locking pin were defective, in that said pin could not be fitted into the holes in said dog and in said bulkhead so as to lock said dog and prevent it from raising; and no other means were provided for locking said dog.

12. At the time of said accident there was a chain attached to the aft bulkhead for the purpose of holding a locking pin for the aft hook, but the pin therefor was missing, and no pin or other means were provided for locking the aft dog.

13. At the time of the accident no device, devices or means were provided for holding said hatch cover in an open or vertical position other than the dogs and pin heretofore mentioned.

14. The dogs were situated at a height beyond the reach of a person on said third deck. When such cover was opened and fastened by the navy personnel, it was the customary practice to push the dog into position by means of a broom handle or pole. A broom handle or pole was maintained on said deck for use for such purpose, but was an inadequate means of fastening the cover. The use of this method would leave the dog unlocked. The locking pin could not be inserted by the pole or broom handle. It could be inserted only by hand. No ready, convenient, suitable or proper means were provided on said vessel for reaching said [25] locking pin. Unless a box or similar object happened to be handy, the locking pin could be reached only by climbing to the top of the hatch cover. The latter method was dangerous to the personnel and was rarely, if ever, used.

15. Said vessel was a Navy cargo vessel owned by the United States. It was being used by and was in the control of the United States Navy, and was manned by a navy crew. It was the announced custom and practice on navy vessels and on said vessel for the navy personnel to open and fasten all hatch covers; orders had been duly given by the proper naval officers to a navy crew on said vessel to open and fasten said hatch cover when necessary to the work of the stevedores.

16. It was the custom and duty of a navy crew to open and fasten said hatch cover so that decedent and his fellow stevedores could unload said cargo.

17. At the time of said accident said forward dog, which had been holding the cover, became disengaged and thereby released its grip on the cover, and, since the other dog failed to reach far enough to grip the edge of the cover, there was nothing to hold said cover and it fell upon the decedent.

18. The said dogs and pin were defective in the particulars heretofore specified, and said vessel was unseaworthy in said particulars and by reason of the absence of suitable, adequate and proper means and devices for securely locking and fastening said hatch cover so that the same could not fall.

19. The United States and its officers, agents, servants, employees and crew upon said vessel knew, or in the exercise of ordinary care should have known, that said dogs and pin were so defective, and that said vessel was unseaworthy by reason of such defects and by reason of the absence of suitable, adequate and proper means and devices for securely locking and fastening said hatch cover so that it would not fall; and the United States was negligent in failing to remedy said defects [26] and in not taking proper and reasonable precautions to secure said hatch cover so it would not fall.

20. The fall of said cover and said fatal injuries were proximately caused by said defective and unseaworthy condition of said vessel.

21. Said navy crew failed to use reasonable care in fastening said hatch cover, and failed to fasten

it securely and safely so as to prevent its falling. The United States, and its officers, agents, servants and employees upon said vessel, were negligent and careless in the use and maintenance of said hatch cover and in leaving and maintaining it in an open position without taking suitable, proper and sufficient precautions to prevent the same from falling to a closed position; and in negligently and carelessly failing to provide a suitable locking device or devices to hold said hatch cover securely when the same was in an upright position so as to prevent the same from falling or being caused to fall in the course of the normal operations of loading and unloading; and by allowing and permitting said hatch cover to remain in an upright position when the respondent United States, and its officers, agents, servants, employees and crew upon said vessel, knew, or in the exercise of ordinary care should have known, that it was not adequately secured; and in failing to replace a locking pin which had been provided for and which was intended to engage the aft dog; and in negligently permitting said hatch cover to remain in an upright position while said aft pin was missing without providing other means to serve the purpose of said pin in holding said hook securely, so as to prevent the same from being jarred or otherwise displaced from its proper position as a locking device; and in failing to lock the forward dog which was provided for the purpose of securing said hatch cover from falling while the same was in [27] an upright position; and in negligently failing to use a locking

pin on said forward dog, so as to prevent the same from being jarred or otherwise displaced from its proper position when in place as a locking device; and in making negligent use of the locking dogs, pins and other devices provided for the purpose of securing said hatch cover from falling when the same was in an upright position; and that the respondent United States, and its aforesaid officers, agent, servants, employees and crew on said vessel, negligently failed to provide decedent, John Henry Mitchell, with suitable or adequate warning, or any warning, of the danger then and there existing by reason of the insecurity of said hatch cover while the same was in an upright position; and that said hatch cover fell from an upright position as the proximate result of the aforesaid negligence of the respondent United States, and its officers, agents, servants, employees and crew on said vessel.

22. As the proximate result of the falling of said hatch cover, the said John Henry Mitchell was killed.

23. Proctors for libelant, respondent and impleaded respondent have stipulated that damages for the death of the said John Henry Mitchell may be assessed in the sum of \$18,000.00.

24. Respondent-impleaded Arrow Stevedoring Company was not guilty of any negligence proximately causing or contributing to the accident.

25. It is not true that the hatch cover had been placed or arranged or secured or maintained in a careless or reckless or negligent manner by im-

pleaded respondent Arrow Stevedoring Company, or any servants or agents or employees of said Arrow Stevedoring Company, and it is not true that any servant or agent [28] or employee of the said Arrow Stevedoring Company conducted himself or his activity in a careless or reckless or negligent manner.

26. It is true that the decedent, John Henry Mitchell, was injured as the direct and proximate result of the defective and insufficient appliances owned, maintained, used and furnished by the respondent United States of America, and as the direct and proximate result of the negligent failure on the part of the respondent United States of America to furnish a reasonably safe place for the employees of the Arrow Stevedoring Company to perform their work and reasonably safe appliances with which to do the work at hand.

27. The contract between the respondent United States and the impleaded respondent Arrow Stevedoring Company, under which the stevedores were working, contained clauses providing for liability to the United States by the Arrow Stevedoring Company for loss or damage sustained by the United States as a result of negligence or wrongful acts or omissions of the officers, agents or employees of Arrow Stevedoring Company, or through the fault of the equipment or gear of Arrow Stevedoring Company. This covenant was subject to the limitation or condition that the Arrow Stevedoring Company shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the United

States, or resulting from compliance by officers, agents or employees of the Arrow Stevedoring Company with specific directions of the Port Director, N.T.S., 12th Naval District, nor for any loss or damage resulting from default of ships or other gear supplied by the United States.

28. The aforesaid accident and the injuries and damage caused thereby resulted from default of ship and gear supplied by the respondent United States. [29]

29. That libelant, Edgar E. Reite, as personal representative and administrator of the estate of John Henry Mitchell, deceased, is and at all times mentioned herein, was a resident of the City and County of San Francisco, State of California, within the jurisdiction of the above entitled court.

30. At all times herein mentioned the steamship U.S.S. Edgcombe was a steam cargo vessel owned by the respondent, The United States of America; and was a public vessel of the United States of America within the meaning of the Statute of March 3rd, 1925, Chapter 428; and at all times herein mentioned was being used by and was in the control of The United States Navy as a naval transport or cargo vessel; and that at the time of the happening of the accident hereinafter mentioned said vessel was lying in the navigable waters of the United States, in San Francisco Bay, in the State of California, and was berthed for the purpose of unloading at Pier No. 18 at the Port of San Francisco.

31. The respondent-impleaded, Arrow Stevedoring Company is a duly organized corporation, and

at the time of said accident said respondent-impleaded, by and through its stevedores in its employment, was engaged in the unloading of said vessel pursuant to said contract with the United States of America.

32. No award or order for payment of compensation has been filed by the deputy commissioner of the United States Employees Compensation Commission, and decedent's widow has not accepted compensation under an award or order filed by said deputy commissioner. A notice of election to sue has been duly filed with the United States Employees Compensation Commission at San Francisco, California, pursuant to Section 33 of the Longshoremen's and Harbor Workers' Compensation Act. [30]

CONCLUSIONS OF LAW

1. John Henry Mitchell, deceased, was engaged in maritime employment and his administrators are entitled to receive under the provisions of the Public Vessels Act.

2. The vessel U.S.S. Edgecombe was unseaworthy with respect to the means provided for securing the hatch cover so as to prevent its falling upon stevedores working in the hatchway.

3. The respondent United States was negligent and its negligence was the proximate cause of the fall of the hatch cover.

4. The decedent was not negligent.

5. The impleaded respondent Arrow Stevedoring Company was not negligent.

6. The fall of the hatch cover and the decedent's injuries were proximately caused by the defective and unseaworthy condition of said vessel in respect to the means for securing said hatch cover and by the negligence of the United States.

7. The respondent United States is liable to the libelant, under and by virtue of the terms of the Public Vessels Act for the injuries to the decedent caused by said unseaworthy condition and by its said negligence.

8. The respondent-impleaded Arrow Stevedoring Company is not liable to the libelant nor to the United States for any part of the loss or damage.

9. The libelant is entitled to recover damages in the sum of \$18,000.00 against the United States and judgment may be entered accordingly, together with libelant's costs in the sum of \$.....

Dated this 19th day of August, 1947.

LOUIS E. GOODMAN,

United States District Judge.

Receipt of copy of the foregoing proposed findings of fact and conclusion of law is hereby acknowledged this 16th day of June, 1947. Said proposed findings are approved as to form.

FRANK J. HENNESSY,

U. S. Attorney.

By WILLIAM E. LICKING,

Proctor for Respondent.

By C. ELMER COLLETT,

Ass't U. S. Atty.

By HERBERT RESNER,

Proctor for Libelant.

[Endorsed]: Filed Aug. 19, 1947. [32]

In the United States District Court for the Northern District of California, Southern Division

No. 24608-G

EDGAR E. REITE, as personal representative and administrator of the estate of JOHN HENRY MITCHELL, deceased,

Libelant.

vs.

UNITED STATES OF AMERICA,

Respondent,

and

ARROW STEVEDORING COMPANY, a Corporation,

Respondent-Impleaded.

DECREE

This cause having been heard on the pleadings and proofs, and having been duly submitted by the proctors of the respective parties, and the court having made and filed its findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed, that the libelant, Edgar E. Reite, recover of and from the respondent United States of America the sum of \$18,000.00, together with libelant's costs taxed in the sum of \$....., and amounting in all to the sum of \$..... with interest on said total sum at the rate of 4 per centum per annum from the date of this decree until paid; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to libellant; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to the United States of America, and that the petition of the respondent United States of America, under Rule 56 of the General Admiralty Rules, be and the same is hereby dismissed on the merits.

Dated this 19th day of August, 1947. [33]

LOUIS E. GOODMAN,

United States District Judge.

Receipt of copy of the foregoing Decree is hereby acknowledged this 16th day of June, 1947. Said Decree is approved as to form.

FRANK J. HENNESSY,

U. S. Attorney.

By WILLIAM E. LICKING,

Proctor for Respondent.

C. ELMER COLLETT,

Ass't. U. S. Attorney.

By HERBERT RESNER,

Proctor for Libellant.

[Endorsed]: Filed and Entered August 19, 1947.

Entered in Vol. 38, Judgment and Decrees at Page 292. [34]

[Title of District Court and Cause.]

RESPONDENT'S PETITION FOR APPEAL

Respondent, being aggrieved by the rulings, findings, and judgment and decree made and entered therein by the above entitled United States District Court on August 19, 1947, claims an appeal from said rulings, findings, and judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that its said appeal may be allowed.

The points and grounds of appeal are the following:

1. The Court erred in finding that respondent impleaded, Arrow Stevedoring Company, was not negligent.

2. That the Court erred in finding that the respondent United States of America was not entitled to indemnity from respondent-impleaded, Arrow Stevedoring Company, under the terms of its contract with said company;

3. That the Court erred in finding that respondent United States of America was not entitled to full indemnity from respondent-impleaded, Arrow Stevedoring Company, under general law in the circumstances of the case.

Dated: November 14, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Proctors for Respondent,
United States of America.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

Done in open court this 14th day of November, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 14, 1947. [36]

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF APOSTLES ON APPEAL AND P R A E C I P E THEREFOR

To Messrs. John H. Black and Edward R. Kay, 233 Sansome Street, San Francisco 4, California, Proctors for Arrow Stevedoring Company, and

To C. W. Calbreath, Clerk of the United States District Court for the Northern District of California:

Respondent hereby designates and requests that the record on appeal in the above entitled action shall include:

1. The Libel.
2. Answer of respondent United States of America. [37]
3. The impleading petition.
4. The answer of the respondent-impleaded, the Arrow Stevedoring Company.

5. Reporter's transcript of testimony as taken Thursday, April 18, 1947, on behalf of the respondent United States of America, together with all exhibits not annexed to the pleadings.
6. The findings of fact and conclusions of law as submitted by the impleaded respondent Arrow Stevedoring Company and signed and filed by the Court.
7. Final Decree entered by the Court herein.
8. Notice of Appeal.
9. Petition for and Order allowing appeal.
10. Assignment of Error.
11. Citation on appeal.
12. Praecipe for Apostles on appeal.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney.
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Dec. 31, 1947. [38]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent United States of America hereby assigns as error in the proceedings, orders, decision and judgment of the District Court in the above entitled action, the following:

1. That the District Court erred in making and entering the findings of fact, conclusions of law, and

order for judgment in favor of impleaded respondent and against the respondent United States of America, made and entered in the above cause; [39]

2. That the District Court erred in failing and refusing to find that the impleaded respondent Arrow Stevedoring Company was negligent;

3. That the District Court erred in finding that the respondent United States of America was negligent;

4. That the District Court erred in finding and holding that the respondent United States of America was not entitled to indemnity from the impleaded respondent Arrow Stevedoring Company under its contract with that company;

5. That the District Court erred in holding that respondent United States of America was not entitled to indemnity from the impleaded respondent Arrow Stevedoring Company under general law.

Dated: Dec. 31, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Dec. 31, 1947. [40]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Edgar E. Reite, etc., Libellant, vs. United States of America, Respondent, and Arrow Stevedoring Company, a corporation, Respondent-Impleaded, No. 24608-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$13.20 and that the said amount has been charged against the United States of America. And I Further Certify that annexed hereto is the original Citation on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of March, A. D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [41]

[Title of District Court and Cause.]

CITATION ON APPEAL

To Arrow Stevedoring Company, a corporation, the
above named respondent-impleaded, and to
Messrs. John H. Black and Edward R. Kay,
its proctors:

Whereas, the United States of America, respondent above, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the entry of a decree denying recovery as prayed for in respondent's impleading petition, which said decree was entered on August 19, 1947, in the District Court of the United States for the Northern District of California;

You are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City and County of San Francisco, State of California, in the Ninth Circuit, on the 14th day of November, 1947.

/s/ LOUIS GOODMAN,

U. S. District Judge.

[Endorsed]: Filed Nov. 14, 1947. [43]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 24,608-G—In Admiralty

EDGAR E. REITE, as Personal Representative
and Administrator of the Estate of JOHN
HENRY MITCHELL,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

ARROW STEVEDORING COMPANY, a Corpo-
ration,

Respondent-Impleaded.

Before: Hon. Michael J. Roche and
Hon. Louis E. Goodman, Judges.

TRANSCRIPT OF PROCEEDINGS

Thursday, April 18, 1947

Counsel Appearing:

For Libelant: Herbert Resner, Esq.

For Impleaded Respondent, Arrow Stevedoring
Company, John H. Black, Esq., and Edward R.
Kay, Esq.

For the United States of America: William E.
Licking, Esq., Assistant United States Attorney.

CLAUDE BOWERS

was called as a witness on behalf of the defendant,
United States of America, and being first duly
sworn, testified as follows:

(Testimony of Claude Bowers.)

Direct Examination

By Mr. Licking:

Q. Mr. Bowers, referring to a date about May 28, 1945, at that time were you employed by the Arrow Stevedoring Company? A. I was.

Q. In what capacity? A. Walking boss.

Q. Do you recall being employed on a vessel about that time on which an accident happened in which one stevedore was killed and others injured due to the falling of a hatch? A. I do.

Q. Was that about the date I mentioned, May 28, 1945? A. It was.

Q. You heretofore testified in the other action that you have heard the Court and counsel discussing? A. Yes.

Mr. Resner: If your Honor please, may the witness be instructed to speak louder so I can hear?

The Court: Speak up.

Q. (By Mr. Licking): In what capacity were you employed by the Arrow Stevedoring Company on the vessel where the accident [2*] happened at this time? A. Walking boss.

Q. As walking boss, what were your duties?

A. I had charge of the stevedoring operations of the ship.

Q. What shift were you on? A. Night.

Q. What time does that shift go off duty, the men on the shift, do you recall?

A. In the evening.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

(Testimony of Claude Bowers.)

Q. In the evening or the morning? Do they go on in the evening?

A. They go on in the evening at 7:00 and come off at 6:00 in the morning.

Q. Are you required by your duties to be on the ship before your gang or remain after your gang leaves?

A. We are required to be there before and after they leave the boat.

Q. State whether or not part of your duties as gang foreman or stevedore foreman—what did you say your capacity was? A. Walking boss.

Q. State whether or not part of your duties as walking boss include remaining there to communicate the condition of the ship and gear to the man taking your position on the next shift.

A. We do.

Mr. Kay: I object to that on the ground no proper foundation has been laid. It would be calling for the opinion and [3] conclusion of the witness. There is no showing as to whether there were any duties, and if they were, they were not in writing. There is no proper foundation for that at all. If he asks what he did do——

Mr. Licking: I do not understand the objection. The objection that a foundation is not laid is an objection addressed to the introduction of a conversation or some such matter. Whether or not this witness as the stevedore walking boss in charge of the stevedoring of a vessel, and employed by the Arrow Stevedoring Company, is competent to state

(Testimony of Claude Bowers.)

what his duties were is a matter for the Court to answer. If the Court consider he is not competent to state what his duties were, the objection would go to the competence of the testimony.

Mr. Kay: Is that what you asked him, what his duties were:

Mr. Licking: I did, and that is what the objection was to.

Mr. Kay: It wasn't asked in that manner.

The Court: Read the last question.

(Question read.)

Mr. Kay: Furthermore, your Honor, on the ground it is leading and suggestive. That won't help me now.

The Court: Why don't you ask him what his duties were and let us proceed.

Mr. Licking: Very well.

Q. As walking boss for the stevedore gang, what were your duties? [4]

A. To supervise the unloading operations.

Q. Did that include the supervision of all the stevedores working on the vessel for the Arrow Stevedoring Company for your shift?

A. Yes, sir.

Q. Is the organization of the two shifts the same, that is, the organization of the day and night shift?

A. The organization is the same, but not always the operation.

Q. The organization is the same; that is, there is a man on the day shift who occupies the same position you occupy?

(Testimony of Claude Bowers.)

A. The same position.

Q. Can you state now whether part of your duties include remaining on board the vessel after your shift goes off? A. Yes, we do.

Q. Can you state whether or not part of your duties requires communication by you of the condition of the ship's gear to the men who take your position on the succeeding shift? A. It is.

Q. On this particular instance, with regard to the accident, you recall the place where the accident subsequently happened? A. Yes, I do.

Q. How would you describe that on a ship briefly? A. How it happened?

Q. No, what was the place; how would you name the place where it happened? [5]

A. The hatch, you mean?

Q. Yes.

Mr. Kay: Your Honor, there is no foundation laid as to time and place. This witness testified before he was not there at the time of the accident. I do not know when he came on afterwards. Conditions had changed then, and it is obviously improper to ask that question in that form.

The Court: I shall have to ask a question or two to get myself in the same position that Judge Roche is in. This witness was on a shift that came on after or before?

Mr. Kay: This witness was the walking boss on the shift that was on the vessel before the shift on which the accident happened.

The Court: He went off the shift before the accident happened?

(Testimony of Claude Bowers.)

Mr. Kay: He went off the shift before the accident happened. He has testified that it was part of his duties to remain after his shift went off.

The Court: Ask him what he did in this particular case. That is what we want to know.

Mr. Licking: I would like to ask him the question I did ask him, your Honor.

Q. The place where your gang was working immediately before they went off, what hold of the ship was it? A. No. 4 hold. [6]

Q. On what deck? A. The lower hold.

Q. As I understand it, there are two hatch covers to that particular hold at that level?

A. Yes.

Q. They open inboard? A. Inboard.

Q. Can you state whether or not on the 28th, on the night shift, the stevedore gang over which you had supervision, did or did not open that hatch?

A. We did.

Q. You did open the hatch. Had you been working above the hatch prior to that time?

A. Yes.

Q. About what time did you come down to the hatch?

A. Well, shortly after we came back from lunch that night. I would say around 1:30 in the morning.

Q. When you opened the hatch did you observe anything unusual about the condition of the hatch or the covers?

A. After we looked at the covers, and we saw what the situation was there, the shape of the hatch——

(Testimony of Claude Bowers.)

Q. What did you see?

A. Well, we say that the hooks wasn't in a proper condition. One was sprung. Had a hard time getting it over the top, but we finally made it. [7]

Q. Hook or hooks?

A. The hooks. There is two of them.

Q. Those hooks drop over the edge of the raised hatch and hold it in place?

A. To hold it in place, yes.

Q. Do you recall whether or not those hooks are equipped or supposed to be equipped with a pin to hold them in place?

A. They are, yes.

Q. You say that you succeeded in fixing both of them over the edge of the raised hatch. On which side was it that you had the difficulty, do you recall?

A. On the port side.

Q. Do you recall whether or not the pins intended to secure those dogs in place after the hatch is raised and they are placed to hold it were there or not?

Mr. Kay: What time?

Mr. Licking: At that time when they secured it.

The Witness: No, only one of them was there. And it was bent.

Q. (By Mr. Licking): And the other one was missing?

A. One was disappeared altogether.

Q. One had disappeared and one was bent. Was the condition of the bent one such that you could not use it, that is, that you could not put the pin in the hole?

A. Just part way. [8]

(Testimony of Claude Bowers.)

Q. Then the device to hold the hatch up was, in the respect you testified, defective; that is, the pins were not there to hold the doors in place, one of the pins wasn't there and the other pin you could not use, is that right?

Mr. Kay: I object to the question on the ground it is complex and calling for the opinion and conclusion of the witness. Mr. Licking says, "In other words, it is defective." Whether it appeared defective to him or not is going to be one of the issues.

Mr. Licking: All right. I will ask him that:

Q. At that time did it appear to you to be defective?

Mr. Kay: The word "defective" is what I object to, your Honor. He can merely describe what it is, and that is for the Court to determine.

Q. (By Mr. Licking): What effect would the fact that the pins were not in have upon the operation of the dogs?

Mr. Kay: Just a moment, your Honor. That is calling for the opinion and conclusion of the witness. If he could not put it on there, he would not know what the effect would be if it was on.

Q. (By Mr. Licking): How long have you been a stevedore? A. Approximately 25 years.

Q. Have you ever seen fastenings of this nature before? A. I have.

Q. Do you know how they work? [9]

A. I do.

Q. Basing your answer on your 25 years' experience and your knowledge of this type of fastening, can you state what the effect of these pins being

(Testimony of Claude Bowers.)

missing would be on the operation of the dogs in holding this lid or hatch cover up?

A. Well, that is a matter of difference. I couldn't say accurately.

Q. You couldn't say accurately?

A. They hold them up.

Q. Can you state whether or not without the pins in there the dogs can come loose through motion of the ship or cargo gear?

Mr. Kay: I object to that on the ground it is incompetent, irrelevant and immaterial. The witness has testified he could not say. Now he is, in fact, cross-examining his own witness.

The Court: Isn't this the testimony that was adduced before Judge Roche?

Mr. Licking: This is the testimony which counsel has characterized before the Court, and I thought the Court might have had the same impression of the evidence that counsel had, and I wanted to check over it.

Mr. Kay: I object further on the ground it has been asked and answered. He says he does not know what the effect would be.

Mr. Licking: He has answered that. He said it would depend upon what happened. [10]

The Court: Are you going to open now with this witness the testimony he gave before Judge Roche?

Mr. Licking: No, I am only going over certain points in the testimony that at that time were apparently not stressed sufficiently to impress them upon the Court or counsel's mind. I intend to prove

(Testimony of Claude Bowers.)

by this witness—I thought I had before—that he noted this defect at the time his gang fastened the hatch up.

The Court: You said that he noted the defect and he reported it to the Navy.

Mr. Licking: No, I did not say he reported it to the Navy.

The Court: Somebody did.

Mr. Licking: That is just the point I had in mind. Somebody else said it, and I want the evidence here so that we are not in doubt as to who testified to what.

(The last question was read.)

Mr. Kay: Your Honor, that is highly conjectural. The witness has testified he would not know the effect. It has been asked and answered.

Mr. Licking: He has not testified anything to that effect. It is proper, particularly in view of what happened.

The Court: Overruled.

Mr. Licking: May I have the question read again?

(Question reread.)

A. Well, that all depends on if anything strikes them or not. [11] I have seen several ships without any pins at all in them and it never hurt them.

Q. (By Mr. Licking): You say it depends on whether something strikes them or not?

A. It depends on whether something strikes them.

(Testimony of Claude Bowers.)

Q. After raising this particular hatch cover, you say at the same time raised the other cover. Did the gang go to work there moving other cargo?

A. In the other hatch, yes.

Q. The other hatch. They did not work under this port hatch? A. No.

Q. They continued to work and take cargo out from under the other hatch? A. We did.

Q. What reason, if any——

The Court: Is there a transcript of the testimony in the other case available?

(A transcript was handed to the Court.)

Mr. Resner: It is indexed.

Q. (By Mr. Licking): What was your reason, if any, for not working your gang under the port hatch cover after you raised it?

A. On account of the unsafe condition in the first place. The gear was not trimmed right to work in that hatch.

Q. When you speak of the gear, to what do you refer? [12]

A. The overhead gear, the falls.

Q. Were the same falls and booms used to unload both sides of this hatch? A. Both sides, yes.

Q. The same one? A. The same one.

Q. And it was improperly rigged for the port side? A. It was.

Q. At the time when you opened the hatch, was there any Navy personnel there helping you?

A. No.

(Testimony of Claude Bowers.)

Q. Will you state whether or not you reported the condition that you found, or any of it, to the ship's officers or to any of them?

A. I did, yes.

Q. What did you report, if you recall, and to whom?

A. To the lieutenant in charge of the ship at that time.

Q. What did you report to him?

A. We reported to him we would be ready to go to work in that hatch there, for him to get the gear ready.

Q. To get the gear ready?

A. And rig it for us. When we got ready to go to work, we found it hadn't been rigged yet. He said he had no men on board the ship that could do it at that time.

Q. What time was this when you spoke to the lieutenant? [13]

A. Around 1:30 in the morning.

Q. He said he had no men to fix the gear at that time. When you speak of the gear, are you referring to these holding devices and the pin or to the unloading gear to which you referred?

A. I am referring to the unloading gear.

Q. To the sling and falls?

A. Sling and the falls, and, well, it will take in the tanks, too. It would take in the tanks.

Q. Are you quite certain that at that time you did not report to the lieutenant that this pin was missing out of the dog?

(Testimony of Claude Bowers.)

A. I told him the dog—I didn't say anything about the pin—I told him the pins was bent and wouldn't go in.

Q. You told him the pins were bent and would not go in the dog. What did he say?

A. He said he would fix it in the morning or have it fixed.

Q. Did he say what time?

A. No, he didn't say what time, as soon as he had the men available.

Q. You continued to work on the other side but did not work on the port side when you found that condition? A. That is right.

Q. Your men worked until what time?

A. Until 6:00 o'clock.

Q. And then left the ship? [14] A. Yes.

Q. Were you on the ship when the next gang, the morning gang, came on on the 28th?

A. I was.

Q. By the way, who was the man on that gang who held the same position you held on the night shift? A. Michael O'Shea.

Q. At that time did you report to O'Shea the condition which you had found in the hold?

A. I did.

Q. Did you report to him that the holding devices were defective as you testified here, that is, that this pin was missing?

A. I told him that the pin was sprung on the top, and they would have to see the Navy to get that fixed before they started operating in that hatch.

(Testimony of Claude Bowers.)

Q. You are quite certain you told him that?

A. Yes, sir.

Q. How soon was that before his gang went to work?

A. That happened about twenty minutes after six, I guess, on that hatch.

Q. That was about 20 minutes after six.

I think I have no further questions of the witness.

Cross-Examination

By Mr. Kay:

Q. Mr. Bowers, you remember when you testified here at the last trial, don't you? [15]

A. I do.

Q. You told the Court the facts as you remembered them at that time, didn't you? The facts that you testified in the last trial here were the facts that you had in mind at that time, is that right?

A. I answered the questions to the best of my ability.

Q. Yes, and you told the truth then, didn't you?

A. I certainly did. I tried my best, anyway.

Q. As a matter of fact, you considered that hatch door safe as it was there? You did not find anything that would indicate to you that it was unsafe when you went on there?

A. I certainly did.

Q. You did?

A. The hook was sprung. We had an awful job to get it over the hatch.

Q. You are kind of mixed up on your facts in this case, aren't you? A. No, I am not.

Q. You never at any time considered that that hatch door, as it was up there, the way you say you lifted it, was safe? You never did consider that it was safe, is that right? You thought it was unsafe all the time? A. I didn't say it was unsafe.

Mr. Licking: Counsel objected continually to my questioning the witness as to his conclusions and opinions, and he has [16] asked for nothing else. I haven't objected but I do now.

Q. (By Mr. Kay): You did make the statement that this hatch on the port side was to all appearances, so far as you were concerned, safe, isn't that correct?

Mr. Licking: I object, if the Court please, if it is proposed to cross-examine the witness with reference to the transcript of his testimony at the former trial. The witness should be shown the transcript rather than having it paraphrased.

Mr. Kay: Very well, we will do that.

Q. I will refer you to page 223 of the transcript of the testimony of the previous trial. Just read this to yourself, line 13 through to line 17.

(The witness read the page of transcript indicated.)

Q. (By Mr. Kay): Have you read it, Mr. Bowers? A. I have.

Q. I will read that to you:

“A. I said the door was safe, but the gear was not safe.

(Testimony of Claude Bowers.)

“Q. That is all you mean?

“A. Yes.

“Q. The door was safe?

“A. The door was safe, yes.

“Q. So far as you could observe, when that door was put up there, it was safe?

“A. It was safe. It looked safe.”

Q. You so testified at the last trial, didn't you?

A. I did.

Q. Is that right?

A. It looked safe from the top. That is when you asked me if I looked down from the top, not from the bottom.

Q. I will not let you look back on this again and see where you can find in that question and anywhere preceding that part that I quoted, that I asked you if it looked safe from the top.

A. The same thing I said before. I did not consider it safe.

Q. This says you did consider it safe. You so testified the last time. Do you remember that?

Mr. Licking: I object to that.

The Witness: Under different circumstances.

Mr. Licking: Counsel, he just now said the same thing he said before: It was unsafe, or looked unsafe.

Mr. Kay: When did he testify it looked unsafe?

Mr. Licking: Just a moment ago. He said the same as he testified before. It looked unsafe.

Q. (By Mr. Kay): The fact is, Mr. Bowers, at the time you worked there that whole shift, so

(Testimony of Claude Bowers.)

far as the door itself, the hatch door itself was concerned, that looked safe to you, isn't that correct?

A. From outside appearance it would.

Q. And the time that you noted these conditions of the bent pins and so on, was after you quit your shift there?

A. No, they called my attention to it right away.

Q. You went to see the lieutenant about the rigging that you considered unsafe, isn't that right?

A. Well, the rigging—their job is the same thing, to lift the hatch.

Q. You went to the lieutenant on the ship to tell him about the rigging. Did you tell him also about the pin, and so forth?

A. I told him it was bent.

Q. You told him you were going to leave the hatch door in that condition until he fixed it?

A. I told him I would leave that hatch altogether and work on the other side.

Q. What did he say about that?

A. He said, "All right."

Q. He did not say when he was going to fix it, but he would get it fixed some time?

A. He would get it fixed as soon as he had the men available to fix it.

Q. The Navy did not give you or anyone representing the Navy instructions as to how to secure this hatch door, did they? A. No.

Q. This rigging is done by the Navy men? You never do any of that?

A. Not the overhead gear, no.

(Testimony of Claude Bowers.)

Q. You did not in this case?

A. We did not touch the overhead at all. [19]

The Court: It was the gear hitting the door that caused the door to fall, is that right? I did not hear the evidence in the case.

Mr. Licking: The door fell because the locking device which should be held by this pin let the door fall. The testimony is the door should not fall with the dogs over it.

The Court: The door fell without any contributing factor? It just dropped?

Mr. Licking: The door fell, the testimony in the record, as I recall it, is due to the vibration of the ship, the movement of the ship, moving the cargo gear or the possibility of the dog being struck by the cargo gear, the dog without the pin in it.

The Court: The gear hit the door—it seems somewhere or other someone mentioned that in the trial of this case.

Mr. Licking: Whether the gear hit the door or not, I would say, your Honor, is not clear from the record. You would agree to that, wouldn't you?

The Court: I do not say that it is.

Mr. Kay: I do not think there was any direct evidence, your Honor, on that.

Mr. Licking: The testimony was further—I think counsel will agree with me—the testimony was without the pin which goes through the dog to hold the dog in position, that the dog could work loose with the ship swaying or could be knocked [20] loose.

(Testimony of Claude Bowers.)

Q. (By Mr. Kay): The Navy lieutenant told you also when you went to see him there was no lashing or anything that you could use for tank tops, is that right, to lash this hatch?

A. He did not tell me a thing about the lashing.

Q. He told you there was no rope, lashing rope or cable?

A. We could see ourselves there wasn't anything there. There was nothing of that sort around, only junk.

Q. What time did you leave the ship the day of the accident? A. Shortly before 7:00 o'clock.

Q. You did not see any of the stevedores come on then, did you, of the next gang?

A. No. Some of them standing outside the gate but they didn't come inside.

Q. You did not talk to them? A. No.

Q. Unless you made a careful inspection of the top where these dogs came over and the pins are put into the dogs, you would not be able to tell from the deck nor from the next deck whether these dogs or pins were properly locked there?

Mr. Licking: I object to that on the ground it is argumentative, calling for the conclusion of the witness.

Mr. Kay: Well, again, he is your witness. You qualified him as an expert to be able to determine from observation these conditions and he has been on other ships with this same [21] kind of tank top.

Mr. Licking: If you ask him a direct question I probably won't object to it. That question is objectionable.

(Testimony of Claude Bowers.)

The Court: Can't you ask him a question, Would he be able to determine that?

Q. (By Mr. Kay): From standing on the next deck could you tell whether these dogs were properly locked and whether the pins were on?

A. Standing on the top deck, well, you could not, no.

Q. Standing on the bottom, on the same deck from which the door swings up, could you tell?

A. You could see from there, yes.

Q. That is ten feet high, isn't it?

A. It is ten feet, that is all.

Q. Does it come out over the edge, that is, the dog? A. The dog comes right over the edge.

Q. Where does the pin fit?

A. Right behind the hook.

Q. You would not be able to see the pin, would you? A. Yes, you can see the pin.

Q. How did you hook them on when you came on there?

A. What do you mean, hook what on?

Q. The dogs on these hatch doors. How did you hook the doors up there?

A. All they do is put the pin on the top there. They are [22] there all the time.

Q. You pull the door open with the ship's gear, don't you? A. Yes.

Q. And that puts it upright? A. Upright.

Q. That is ten feet above the deck, the top of it, the top surface?

A. Above that portion of the deck, yes.

(Testimony of Claude Bowers.)

Q. How are the hooks fastened on?

A. There is a stanchion there that comes out a short ways there. They hook onto that.

Q. Did you see that done? A. Yes.

Q. Do you know who in your gang did it?

A. I do.

Q. Who was it?

A. They are both in court now.

Q. How did they do it? From the deck?

A. From the deck.

Q. They could not reach ten feet?

A. One man lifted another man up and put him on top to reach.

Q. That was done on both sides in there?

A. Yes.

Q. And you were right there at the time?

A. I was. [23]

Mr. Licking: Counsel, may I interrupt just a moment?

Mr. Kay: Certainly.

Mr. Licking: Judge Roche is familiar with the locking device. There is an exhibit some place in the case that will show the locking device.

The Clerk: The exhibits are before the Circuit Court.

(Discussion between counsel as to diagrams of hooks.)

Q. (By Mr. Licking): Can you draw that hook out there so the Judge can see it? Assuming that this is the side view of that hatch door as it sits up

(Testimony of Claude Bowers.)

on deck, can you put the hook on there as it would be? Where is that locking pin?

A. It is in the rear here.

Q. Draw the other one right alongside there.

Mr. Kay: There is a pin on that side, is that right?

The Witness: This door does not lean that way.

Q. (By Mr. Kay): Don't the two doors open this way as we have them roughly drawn?

A. One of them falls at an angle, lays at an angle.

Q. Did the port one lay at an angle?

A. No, the starboard side. If we draw it over here, that would be more like it. It would be at an angle like that (indicating).

Q. This is the starboard that leaned in?

A. That is right.

Q. We have them backwards on this diagram. We will mark this [24] for identification. That is an awfully crude drawing, Judge.

The Court: This is the open hatch on this side?

Mr. Kay: That is right.

The Court: These are the two pins that hold the hooks?

The Witness: That hold the hooks.

Q. (By Mr. Kay): And those are on the inside between the two covers as they come up?

A. Yes, in one way they are between the two covers.

(Testimony of Claude Bowers.)

Q. It would be pretty difficult to see those pins when they are up between the two covers unless you got right up and looked at them?

A. If you got right in and looked at them.

(The drawing in question was thereupon marked Respondent Arrow Stevedoring Company Exhibit A for identification.)

Mr. Licking: Rather than have it marked for identification, I will offer it at this time.

Mr. Kay: We will offer it. It is just as well.

The Court: Mark it in evidence.

(The document referred to was thereupon received in evidence as Respondent Arrow Stevedoring Company's Exhibit A.)

Mr. Kay: If the Court please, I would like to have the witness refer to his testimony on page 220, starting with line 24 and to line 11 on page 221. Will you read that to yourself, please?

(The witness did as requested.) [25]

Q. (By Mr. Kay): At the time of the last trial, when you testified in connection with this matter, you testified as follows, did you not?

Mr. Licking: If the Court please, I object to a reading of the testimony. It is not based upon any question. He has not asked the witness for it. He has a right to read the testimony if it is impeaching and if he has asked the question, but he hasn't a right to ask the witness merely to read something and then proceed to read it aloud himself.

(Testimony of Claude Bowers.)

Mr. Kay: Very well, we will do it the other way, your Honor.

Q. The fact is, isn't it, that this hatch, the hooks and so on that go in there, appeared to you to be in a safe condition, that is, the port hatch, when you opened it?

Mr. Licking: To which I object on the ground it has already been asked and answered.

Mr. Kay: I noticed some other testimony here, your Honor. This is some other testimony. It is not what we refer to in the last question.

Mr. Licking: Is it prior or subsequent to that place you referred to in the other question?

The Court: It is answered over on the following page.

Mr. Kay: Up to line 12 on page 221, your Honor. I would like to ask it in the form I did before, your Honor, because it simply facilitates things here. It must be remembered Mr. [26] Licking is putting this man back on the stand, and I think, to keep the record straight in this case, we are perfectly justified in asking the question in this way.

Mr. Licking: The Court has the testimony before it, in any event. You are going over something that is before the Court. If you wish to, I will stipulate you may read all the examination.

Mr. Kay: I don't want to read all the examination. I have a purpose in reading it.

Mr. Licking: What is the question?

(Testimony of Claude Bowers.)

The Court: He asked him when he opened the doors did they appear to be in safe condition.

Mr. Kay: That is right, whether the port hatch appeared to be in a safe condition when you opened it.

The Witness: It appeared to be, until you looked at it, tried to get the hooks into it.

Q. (By Mr. Kay): It appeared all right to you, so that you left it in that condition so far as the door is concerned, is that right?

A. There was nothing we could do about the door.

Q. Well, but it appeared all right to you, didn't it?

A. From a casual look.

Q. You testified at the last trial as follows:

“Q. Did you notice at that time whether this appeared to you to be in safe condition, the port hatch, when you opened [27] it?

“A. It appeared all right, yes.

“Q. If it had not appeared all right, you certainly would not have left it in that condition. You were concerned with the safety of the men?

“A. We didn't leave it in that condition.

“Q. What did you do?

“A. We left it for the night crew to trim the gear so we could work in the hatch.

“Q. You say you did not leave it in that condition. What do you mean by that?

“A. The hatch was all right.

(Testimony of Claude Bowers.)

“Q. The hatch was all right when you left it, is that correct?

“A. Yes, absolutely.”

You so testified the last time, didn't you?

A. I said it looked all right.

Mr. Kay: That is all.

Mr. Resner: I was wondering whether I was in the case. Do you mind, Mr. Licking?

Mr. Licking: Not at all.

Cross-Examination

By Mr. Resner:

Q. Mr. Bowers, just so there will be a picture of how this happened, I have drawn a sketch. As I understand it, these tank tops fit on hinges at the bottom of the compartment [28] and lift up and come together inboard in just about the opposite way that a sidewalk elevator opening would open?

A. The same.

Q. The same construction, but whereas a sidewalk elevator opening comes out, these two come inboard, is that right? A. Yes.

Q. The way this ship is constructed the bulkheads extend far enough so that when these tank tops come up, they sort of lean back against the bulkheads? A. Yes.

Q. And at east end of the bulkhead, on both the forward and after end, are two hooks for each tank top, is that correct? A. Yes.

Q. As I understand it, the starboard tanktop or the one in which your gang worked the night before

(Testimony of Claude Bowers.)

the accident leaned back so that by gravity it would to some extent rest against this bulkhead protrusion, is that right? A. Yes.

Q. And then the hooks would come over on the starboard side and fit exactly over the tanktop so it would secure it and then the pin would go through those hooks on the starboard side, is that right?

A. Yes.

Q. And these hooks were about eight inches or so in length, is that correct, that went over the tanktop? [29]

A. I don't know exactly. They was in that neighborhood, though.

Q. And these pins, as I understand it, were on chains? A. Chains.

Q. And they were fastened to the bulkhead, and when they were out of place, they would hang loose on the chain? A. Yes.

Q. When you would put them through, they would still be hanging on the chain but the point would go through the flange and thus secure the hook? A. Yes.

Q. And that was the way it was on the starboard side, the good side? A. Yes.

Q. On the port side the tank top was almost perpendicular, that is, it was straight up and down so that there wasn't any gravity which would hold it in place? A. It was straight up.

Q. In other words, unless there was something to secure it, it would fall with any movement, is that right?

A. I don't know whether it would fall or not.

(Testimony of Claude Bowers.)

Q. In any event, let us put it this way: It was straight up and down?

A. It was straight up and down.

Q. As distinguished from the one on the star-board side. As I [30] understand it, the hook on the after part of the port tank top was bent, is that right.

A. I wouldn't say which one it was.

Q. One of the hooks was bent so that it would not fit over the tank top, but the edge of the hook would just rest at the edge of the tank top, is that correct?

A. It came down far enough to hold it.

Q. It came down, but the pin would not go in?

A. Not all the way.

Q. Not all the way, so there was no pin to secure it?

A. Not with a pin.

Q. The pin would not go through to secure it?

A. No.

Q. On the other hook on that port tank top, the pin was missing completely, is that right?

A. You are referring to two different tank tops.

Q. I am referring to the port tank top. There are two hooks on the port tank top; one was bent so it would not go all the way in through.

A. One was sprung.

Q. One was sprung, and the other had the pin missing?

A. They had only one missing. One was missing and one bent pin.

Q. That is what I am saying. One was bent and one was missing?

A. You couldn't get it all the way through. [31]

(Testimony of Claude Bowers.)

Q. Is that the true picture of what existed there?

A. Yes.

Q. As I understand it, in the middle of these tank tops there is a ring which you hook on to lift them up with the falls so you can lean them against the bulkhead before you fasten them?

A. Yes.

Q. It would have been possible to lash those two hooks together so the two tank tops would be lashed together?

A. Yes.

Q. But there wasn't any cable on the ship so that could not be done?

A. There was lots of junk around there but we had no access to it.

Q. The general rule is when you come aboard a ship the Navy is supposed to rig the gear; the stevedores are not supposed to touch it?

A. That is their job.

Q. That is their job, but with a casual look, this tank top, if you looked at it without examining it, it seemed to be all right?

A. If you just looked at it.

Q. If you just looked at it, it looked all right.

A. Yes.

Q. During the course of the operation you went to the Navy lieutenant in charge when you were about ready to discharge [32] these empty ammunition cases from the port side and told him you were ready to go to work on the port side and for him to lash the tops?

A. I told him to get the gear ready for us to go down there.

(Testimony of Claude Bowers.)

Q. And he said he did not have the gear?

A. He said he didn't have the men available.

Q. In any event, you knocked off at 6:00 o'clock?

A. That's it.

Q. Your men did not even go in the port side where this accident happened?

A. We didn't work in there at all.

Q. The next night, the night of the accident, you came back at 7:00 o'clock? A. Yes.

Q. You heard about the accident?

A. Heard about it.

Q. You saw now the two tank tops lashed together and the two rigs were held together by means of a cable? A. At night, yes.

Q. They lashed the tank tops, is that right?

A. Yes.

Q. They couldn't lash the tank tops before?

A. If they had the men, they could have.

Q. That was the Navy's job, wasn't it?

A. Yes, sir. We don't do that. [33]

Q. In other words, if they had good cable aboard, and they had been taking care of their job, they would have lashed those tank tops before this accident happened?

Mr. Licking: To which I object on the ground it is purely argumentative, has nothing to do with the direct testimony given by the witness, and is an interrogation on the field of the Navy's duty, to which the witness is not competent to testify.

The Court: You have brought out the fact.

Mr. Resner: I will pass that, then.

(Testimony of Claude Bowers.)

Q. In any event, when you came back that night after the accident in which Mr. Mitchell was killed and Mr. Williams who sits in court was hurt, you found one hook was sprung or bent as it had been the night before the pin was still missing; that part of the gear had not been fixed?

A. I seen the thing was lashed together with wire. That is as far as we went.

Q. You knew it was not fixed?

A. When we came back it was fixed, yes.

Q. It was lashed? A. It was lashed, yes.

Q. But the hooks and the bolts were not fixed?

A. With that wire we didn't even notice it, didn't pay any attention to it.

Q. What is that?

A. We came back to work the next night and we didn't bother [34] with the hooks that night.

Q. You knew they were not fixed?

A. We knew they were not in shape. I don't know whether they fixed them in the day.

Q. You gave me a statement in which you said they did not fix them.

A. Didn't fix the hooks?

Q. Yes, and the pin in the meantime.

A. No, I said they lashed them. I might have been mistaken. We didn't examine that close. They was over the top.

Q. You recall when I discussed this thing two or three times in great detail, Mr. Bowers?

A. Yes.

(Testimony of Claude Bowers.)

Q. You were trying to give us a correct picture of just what happened there. You recall the last statement when you came down to my office this month, just a few days ago?

Mr. Licking: Is the witness to be properly cross-examined with reference to written statements he is supposed to have given counsel?

Mr. Resner: I think this is proper.

The Court: I think it is perfectly proper. He made the statement.

Mr. Licking: Without my examining it?

Mr. Resner: You can come up and look at it. I will give you a copy of the statement and you can look at it. [35]

Mr. Licking: I would like to have a copy of the statement.

Mr. Resner: It is a little bit more, Mr. Licking, than I have been able to secure from the Government.

Mr. Licking: That is very nice of you, but the point I am suggesting, your Honor, is this: May counsel, by going outside the field of direct examination of the witness, create a field for cross-examination, which has been done here, and then after creating the field by questions outside the direct examination, proceed to impeach the witness in the field outside? That is just what has been done here.

Mr. Resner: I am only doing it for this reason, Judge, and I am concerned with the question of approximate cause, and I am presenting my case with that thought in mind.

(Testimony of Claude Bowers.)

Mr. Licking: If you are taking the witness for that purpose as your own rather than on the field of cross-examination, I have no objection to the witness testifying to anything, but this is not proper cross-examination.

Mr. Resner: I think so. He is your witness.

Mr. Licking: This has to do with the next day. This has to do with the condition that existed after the accident happened. It hasn't conceivably anything to do with the direct testimony given by the witness. I object on that ground.

The Court: When did this occur?

Mr. Resner: The following day, right after the accident.

The Court: What relation has that to the accident? [36]

Mr. Resner: It shows the liability of the Navy, and it shows their knowledge. It shows that they rigged the gear after the accident by lashing this defective tank top to the good tank top, and it shows that they did not fix the pin, and it merely, so far as I am concerned, proves definitely the unseaworthiness of the ship and the approximate cause of the accident in which Mr. Mitchell was killed.

The Court: I think we are agreed that we will allow the testimony.

Mr. Licking: I haven't any objection to the witness testifying to that, but I respectfully again call your attention to the fact that it is not in the field of cross-examination. It is twelve hours after

(Testimony of Claude Bowers.)

the accident and does not concern anything about which the witness has testified.

Q. (By Mr. Resner): Mr. Bowers, the fact is, according to this statement, they lashed it after the accident? A. They lashed it afterwards.

Q. But did not fix the hooks and pins?

A. I wouldn't go in there until it was fixed.

Q. As I understand it, you men would not go in afterwards until it was lashed? A. No.

Q. Because it was unsafe gear?

A. The way the gear was leaning—take the overhead—and they do that all at one time. But the main reason we didn't go in [37] the hatch was on account of the overhead, but that takes in the tank tops and all.

Q. Certainly the way you were pulling the cargo out with the falls, unless that tank top were lashed or secured it would be dangerous?

A. Either that would be dangerous, if the fall wasn't directly in the middle of the ship—then there is a possibility it would be all right—but the way the gear was laying there, you would knock everything down.

Q. Without it being secured by hooks and pins or being lashed? A. The gear the way it was.

Q. Is my statement right?

A. Yes, the way the gear was laying.

Q. There was a whole hour that elapsed between the time you left the ship and the starting of the day gang with which Mr. Mitchell was working when he got hurt?

(Testimony of Claude Bowers.)

Mr. Licking: I object to that as argumentative and a misstatement of the witness' testimony.

Mr. Resner: Is that right, Mr. Bowers?

Mr. Licking: That is a misstatement of the witness' testimony.

The Witness: Let him say the question again.

Q. (By Mr. Resner): You knocked off at 6:00 o'clock in the morning?

A. No, the gangs did. I stayed there until 7:00.

Q. The gang knocked off at 6:00 o'clock; the next gang came on at 7:00? A. 7:00.

Q. During that hour period no stevedores worked the ship?

A. No stevedores worked the ship.

Q. But the crew and the Navy officers were still aboard? A. Yes.

Mr. Resner: That is all.

Redirect Examination

By Mr. Licking:

Q. During that period of time were the Navy crew or the Navy officers or any of them in this hold? A. I don't know.

Mr. Kay: Just a moment. I object to that on the ground no proper foundation has been laid. This witness is not shown to have sat there or remained in this hatch for an hour.

Mr. Licking: What is this business of foundation? I asked a question. Read the question, Mr. Reporter.

(Question read.)

(Testimony of Claude Bowers.)

Mr. Kay: Your Honor, there is no foundation laid there. How do we know he was there? He does not sit there for an hour to see if the Navy crew come there.

The Court: The answer is innocuous. He says he doesn't know.

Mr. Licking: I thought he said, "No," your Honor.

The Court: He said he didn't know. [39]

Mr. Kay: I will withdraw the objection.

Q. (By Mr. Licking): At the time the crew under your direction raised this hatch cover, the condition of the hatch cover and the condition of the gear, as I understand your testimony, made that portion of the hatch unsafe to work?

A. Yes, sir. We didn't work the hatch.

Q. That is the reason you did not work the hatch. Will you state whether or not in your opinion at that time it was unsafe to work?

Mr. Resner: We can stipulate to that now, I think.

Q. (By Mr. Licking): Do you understand my question?

Mr. Kay: We will object to that as calling for the——

Mr. Licking: We have one counsel objecting and the other counsel stipulating.

Mr. Kay: I object to that, if your Honor please, on the ground that that is the very thing the Court has to determine. That is asking the witness to give an opinion on the very issue that the Court must determine.

(Testimony of Claude Bowers.)

Mr. Licking: I asked the witness to give an opinion on whether or not a condition is safe for work which he has testified he has had 20 years of experience on, and which he at that time was in the official position of supervising for the defendant the Arrow Stevedoring Company, the impleaded respondent. I think the question is perfectly proper.

The Court: I must confess I do not know what you are [40] getting at there. What was unsafe?

Mr. Licking: I asked him if the number 9 hatch——

Mr. Resner: No. 4, Mr. Licking.

Mr. Licking: I asked him if the No. 4 hatch, where this cover was lifted, and the accident afterward occurred, was, at the time he raised it, unsafe in his opinion.

The Court: Well, if it fell down obviously it was not safe.

Mr. Kay: I know what Mr. Licking is getting at. He wants to show knowledge on the part of this stevedoring boss that he at that time thought it was safe or unsafe.

Mr. Licking: Why can't I show it? That is what I want to show.

Mr. Kay: Very well. On my cross-examination I believe I have shown that he thought it was perfectly safe.

The Court: Judge Roche and I will have to weigh that testimony.

Mr. Licking: You and Judge Roche may have to weigh it, your Honor, but I submit that I am

(Testimony of Claude Bowers.)

entitled to ask this witness if in his opinion the hold under this port hatch was a safe place to work after it was raised and secured as he has described it there. That is the question I asked him and I think I am entitled to an answer to the question, if in his opinion it was safe at that time to work.

Mr. Kay: He is going back on direct examination, your Honor, [41] and asking this witness——

Judge Goodman: So far as I am concerned, let him answer the question.

Judge Roche: He may answer.

Q. (By Mr. Licking): Do you understand the question? A. What is the question?

The Court: I suggest that you reframe the question and ask it directly.

Q. (By Mr. Licking): Why didn't you work the port hatch of No. 4 that night after you raised it?

A. The condition of the gear, the way the gear was sitting, the overhead gear.

Q. The condition of the overhead gear?

A. The condition of the overhead gear, yes.

Q. Did the condition of these devices to hold the hatch cover up have anything to do with your decision not to work it?

A. Well, they would not, to a certain extent.

Q. I am just asking you if they did or did not; did you consider that factor in the case?

A. The only thing I took into consideration at that time was the overhead. That is the first thing you consider in an operation of that kind.

(Testimony of Claude Bowers.)

Q. (By the Court): Will you answer this question: Did you quit work there because of the pin?

A. No, I quit work on account of the overhead gear. [42]

Q. That is what caused you to quit work?

A. That is what caused me to quit work.

Q. (By Mr. Licking): When you reported the condition to O'Shea, the next man on the job, who took over after you, did you mention to O'Shea the pins as well as the gear?

A. I told him one of them was sprung. He couldn't get it in place properly.

Q. Did you tell him the other one was missing?

A. Yes.

Q. You said this, from a casual glance, looked all right. By that do you mean these locking devices and pins looked all right at a casual glance?

A. Yes, if you were on top of the hatch they would look all right.

Q. How long did you say you had been a stevedore? A. Approximately 25 years.

Q. Were you walking boss before you were a foreman? A. No, that is all the same job.

Q. Who has immediate charge of the gang working the hatch? A. The gang boss.

Q. Who was the gang boss on the shift next?

A. I don't recall his name. I don't know his name.

Q. Who was the gang boss on the next shift, the gang boss when the accident occurred? Was it a man by the name of Larsen?

(Testimony of Claude Bowers.)

A. Yes, Larsen was his name. [43]

Q. Have you held that position? Are you familiar with the duties of that position also?

Mr. Resner: I submit, your Honor, that is irrelevant.

Mr. Licking: Do you think it is?

Mr. Resner: Certainly.

Mr. Licking: I will take a ruling on the question on its relevance, the duties of the man who has immediate charge. The record will show that Larsen testified that he himself did not go down into the hold, that he merely looked down from the top before sending his man down.

The Court: Who was Larsen? The other boss?

Mr. Licking: Larsen was the other foreman.

Mr. Resner: Larsen was the gang boss. This gentleman was the walking boss in charge of more than one gang. The gang boss in in charge of one gang.

Q. (By Mr. Licking): I asked you if you had ever been gang boss before you became walking boss, not on this particular job, but on other jobs.

A. On other jobs I have some, yes.

Q. Are you familiar with those duties also?

A. Yes.

Q. Familiar with what proper stevedoring practice in that respect is? A. Yes, sir.

Q. Can you state whether or not before sending the crew down [44] in the hatch it is or is not proper practice for the man who has charge of them to

(Testimony of Claude Bowers.)

examine the gear and also the devices, such as these hatch covers and the devices to hold them in place?

Mr. Resner: I submit, if your Honor please, that that is irrelevant and incompetent to the issue here involved. The only question, as I see, is the unseaworthiness of the vessel and the approximate cause.

Mr. Licking: He has testified that at a casual glance from the top this looked all right. Larsen says that is all he gave it, was a casual glance from the top, and I want to know if Larsen fulfilled his duties in taking a casual glance from the top before going down into the hold.

Mr. Resner: This is not the witness of whom to ask that question.

Mr. Licking: Shall I ask Larsen if he properly performed his duties?

Mr. Resner: If your Honor please, the proper way to ask that question is of an expert in the stevedore business—not that Mr. Bowers does not know his work. He had a lot of experience. But he was a walking boss and not a person who would make the determination of what the gang boss of any particular gang should or should not do.

Mr. Licking: He had been a gang boss. He said he was familiar with the practice in that respect, and I submit he is qualified by 25 years of experience to answer the question. [45]

The Court: Let the witness answer the question.

The Witness: If I was running the gang, I would have been down there when they changed over. That is the only opinion I can give.

(Testimony of Claude Bowers.)

Q. (By Mr. Licking): Do you think it is proper practice before sending the gang down to satisfy yourself from the top of the hatch as to conditions below? A. No, I do not.

Mr. Resner: I object to that as a conclusion of the witness.

Mr. Kay: I ask that the answer be stricken.

The Court: What do you mean by a glance from above?

Mr. Licking: Well, just an inspection from above. Larsen has already testified that he did not go down. That is in the record.

The Court: He made his inspection from the top?

Mr. Licking: He looked from the top and it looked all right from the top. This witness has said it looked all right from the top. I want to know if the man in charge of the men going down there has properly discharged his duty by just looking from the top, or if he should go down and see what conditions are before he puts his men to work.

Mr. Resner: I object to that on the ground it is not within the issues of the case. What has that got to do with approximate cause and the unseaworthiness of the ship? [46]

Mr. Licking: The whole thing is this: Counsel seems to regard that—I do not think so—unseaworthiness of a ship is something that works by itself.

The Court: There is merit in my opinion to Mr. Resner's objection because how are you going to tell what the extent of the contribution is? A man

(Testimony of Claude Bowers.)

might not have performed his duty in precisely doing everything some stevedore would do, but would that make the stevedoring company the sole proximate agency, put upon its shoulder the sole proximate blame for the accident?

Mr. Licking: I am not necessarily limiting the case to proving sole proximate cause on the part of the stevedoring company, but certainly it goes to show that what their agents did was a contributing factor. The libelant is not cross-respondent here. The workmen are not the cross-respondent. The Arrow Stevedoring Company is. I am entitled to show whether or not the Arrow Stevedoring Company's walking bosses discharged their duty, but whether Larsen, the man in charge of this particular gang, discharged his duty, whether he did properly stevedore the ship.

Mr. Kay: That is a pretty broad thing here, your Honor. We have one walking boss here that might have done something in detail and another one that may have made the inspection that was proper, and I think it is putting this witness in the position of being an expert for which he is not really qualified in [47] that regard. He is not a safety engineer. He is not the officer or agent of the stevedoring company with respect to certain duties that they are required to do. I think that is getting pretty far afield here.

Mr. Resner: You run into the whole question of what duties are imposed upon stevedores by way of inspecting gear.

(Testimony of Claude Bowers.)

The Court: He might have inspected from the top and under certain conditions an inspection from the top might have been sufficient. That opens up a pretty big field, doesn't it?

Mr. Licking: I understood the witness to say it looked safe from the top, but from the bottom it could be observed it was not safe. That is, the pins were not in there.

Q. Was that your testimony? A. It was.

Mr. Kay: He did not so testify, your Honor. He said from the bottom he could see whether the pins were in. This question is whether he thought it was unsafe or not.

Mr. Licking: I did not ask that question.

Mr. Kay: You used the word "safe."

Mr. Licking: Not now I didn't use it. I just asked if it was proper practice for the man directly in charge of the gang who went into the hatch to go into the hatch to make an inspection to see what conditions were before he put his men in there.

Mr. Kay: I object to that on the ground no proper [48] foundation has been laid, incompetent, irrelevant and immaterial.

Mr. Licking: Well, if after 25 years' work and having held the same position himself——

The Court: Let him answer.

Q. (By Mr. Licking): Do you understand the question?

A. That all depends on the situation.

Q. Well, in this particular situation that there was there.

(Testimony of Claude Bowers.)

Mr. Kay: Just a minute.

Mr. Licking: The particular situation that was there when you left the job with the hatch in that shape.

The Court: The difficulty is you did not permit the witness to conclude his answer.

(Question and answer read.)

The Witness: That all depends on the situation. This man might have been busy on deck at the time those fellows were there, and if anything was wrong, somebody would notify him below. It is a long ways down there. It takes you five minutes to get down to the bottom of that ship. You could only see the square of the hatch here.

Q. You mean in any other ship you could see the whole operation from the top?

A. It wasn't so high. There was so much space between the cargo and the top of the hatch.

Q. On this particular ship you could not see the condition of [49] the gear and the hatch covers down below from the top, do you mean?

A. You could see it from the top. It appears from the top it would look all right. It is like an elevator shaft, and you couldn't see if there was anything wrong or not from the top.

Q. I asked you if under those circumstances it was or was not proper practice for the man in charge of them to make an inspection down there before he sent them down to work.

(Testimony of Claude Bowers.)

Mr. Resner: If your Honor please, I object to that on the ground that calls for a conclusion, and that is one of the questions before this Court. Circumstances vary according to the particular case. Mr. Licking is asking the witness for an opinion on a question of law.

Mr. Licking: I do not think it is a question of law. It is a question of proper practice in his own trade.

The Witness: It is too broad there. I couldn't say that. Where one man would another man would not. He would be right whichever way he did it, in a situation the way that ship is laid out there, because it was about five to eight—well, I would say a man of his age it would take more than five minutes for him to climb down there. I would say he *could* down there in a half hour after he got things started on the deck. That is where you usually start, on the deck of the ship. By the time he got down there to where the cargo was, through all the quarters, it would take quite a while to get there. [50]

The Court: Are we going to conclude with this witness?

Mr. Licking: That is all. I have no further questions of this witness.

The Court: Is that all of the witness?

Mr. Kay: That is all.

KASIMER ANZULOVICH

was called as a witness on behalf of the United States, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court? A. Kasimer Anzulovich.

Direct Examination

By Mr. Licking:

Q. Mr. Anzulovich, are you a stevedore?

A. Yes, sir.

Q. Do you know the gentleman who was just on the stand? A. Yes, sir.

Q. Do you recall an occasion some time about May 28th of last year?

A. Well, I remember things.

Q. Do you remember the thing?

A. I remember how it was but I never saw the accident.

Q. You never saw the accident? A. No, sir.

Q. The accident occurred on the day shift and you worked on the night shift? [51]

A. That is right.

Q. When you worked on that night shift, what work were you doing on the ship yourself?

A. We were discharging, I don't know, it was kind of shell empties.

Q. During the course of your work on the night shift, did you finish up on one deck and have occasion to open the tank doors, below?

A. Yes, we went to open the tank doors.

(Testimony of Kasimer Anzulovich.)

Q. What time was that?

A. I can't remember because I was so new at that time I didn't pay no attention.

Q. You didn't pay any attention?

A. I don't remember.

Q. You do remember you unloaded the cargo, you came down on your night shift and opened the doors?

A. That is right.

Q. Who opened the doors? Your stevedore gang?

A. Our gang did, yes.

Q. Did the Navy have anything to do with the doors?

A. I didn't see no Navy.

Q. When the doors were opened, did you notice anything about the fastening of the doors that was different than usual?

Mr. Kay: Just a minute, again, your Honor. That is leading. You can ask the witness what he saw, but Mr. Licking [52] continuously assumes and puts in his question some suggestion as to what the witness knows.

Mr. Licking: I asked him if he observed anything out of the ordinary in connection with the fastenings of the doors.

Q. (By the Court): Was the door fastened?

A. In my opinion——

Q. No, no. How was it fastened?

A. I saw just two loose hooks on top—that is all I saw. I didn't see no pins of no kind. Just got the hooks on top of it.

Q. (By Mr. Licking): You saw no pins?

A. I didn't see no pin.

(Testimony of Kasimer Anzulovich.)

Q. Did you work under it afterward?

A. I told you, your Honor, I was new. I had my partner, an old stevedore, a walking boss and the gang boss wanted us to use scows about 8 foot by 5 foot to go down there. My partner went upstairs and looked for the foreman and told him he wants nets to put that stuff in there. That is safer. So we used the nets after that. But the walking boss found out about the gear on that side, the port side—whatever he said; I didn't understand what it is then—and then we walked to the other place and we used the nets.

Q. Did you work at all on the cargo on the port side? A. We didn't work at all on that side.

Q. You did not work at all on that side? [53]

A. No.

Q. But you do know the stevedore gang raised the hatch? A. Yes, sir.

Q. Who hooked it up, do you recall that?

A. What?

Q. Do you recall who on the job put the hooks on there?

A. I don't know. Some of us. I don't know which, but just raised it up and put those hooks on it. That is about all there is to it. There was no pins of no kind.

Q. There weren't any pins, did you say?

A. No, when we came the next evening we find that thing is strapped together. If they done that before, there would be no accident at all.

(Testimony of Kasimer Anzulovich.)

Q. When you say if they had done that before—

A. I don't know who was supposed to do it. If I was a foreman I would do it myself, even if the Navy wasn't there, for safety first.

Q. Did you notice whether or not the pins were there on these locking devices?

A. I never noticed the pins at all. If I remember, we got up and put those hooks down like that. I thought the things were standing like that, and I thought it was safe by itself. It was heavy doors and I never thought that darn thing would go down.

Q. Do you yourself have anything to do with fastening the [54] hooks? A. No, sir.

Q. You did not?

A. No, sir. Just helped one fellow go up a little bit and I seen him drop the hook down.

Q. You helped one fellow go up a little bit?

A. Yes.

Q. How do you mean you helped him go up a little bit? You lifted him up?

A. Lifted him up. It was kind of high.

Q. Do you remember who it was you lifted up?

A. I don't know. Some fellow.

Q. You don't know who it was?

A. Some stevedore that was in our gang. I can't remember. I was green at that time, still green.

Q. You say you did no work at all on the port side of that hatch? A. No.

Q. Was the door or cover to the port side of the hatch still up when you left the ship?

A. Both doors were standing like that together when we left the ship.

(Testimony of Kasimer Anzulovich.)

Q. When you left the ship? A. Yes.

Q. The same way as when you opened it? [55]

A. Same way.

Q. Was any Navy personnel in and about there when you were working there?

A. I don't remember seeing nobody down there.

Q. Do you not remember seeing any naval personnel down there? A. No, sir.

Mr. Kay: No questions.

Mr. Resner: No questions.

JOSEPH KOKICKS

was called as a witness on behalf of the defendant, United States of America, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court? A. Joseph Kokicks.

Direct Examination

By Mr. Licking:

Q. Mr. Kokicks, you are a stevedore by occupation? A. Yes, sir.

Q. Do you know Mr. Bowers, who testified a while back? A. Yes, I know him.

Q. Were you working on that same ship on May 28, 1945? A. I was right down below.

Q. You were right down below? A. Yes.

Q. You were on the gang that worked the No. 4 hatch? A. Yes.

(Testimony of Joseph Kokicks.)

Q. That night. Do you recall whether or not you had occasion to lift the tank covers on the night shift?

A. Yes, I was going to do it myself. All the rest of them, and I was, too.

Q. All the rest of them did it? A. Yes.

Q. Do you know about what time on the night shift?

A. It was after midnight. I don't know exactly what time it was.

Q. It was after midnight?

A. We didn't have no watch.

Q. Who raised the hatch doors?

A. The winches. We hooked on and the winches lifted it up.

Q. The stevedoring company crew operated the winches and the attachments to the door?

A. Yes.

Q. Do you recall how the doors were fastened up after they were raised?

A. The doors, when they were raised up, were leaned against a bulkhead. The two flanges, when it comes up to rest on it, had a big dog to flop over like that. It was pretty far and leaning in. I would say it was about that far from the bottom (indicating). [57]

Q. Indicating about three feet from the bottom. You have indicated a hook almost at a right angle hanging over the edge?

A. Yes, a piece of metal cut around like a hook.

(Testimony of Joseph Kokicks.)

Q. Do you remember whether or not those hooks were equipped with any pins to hold them in place?

A. I couldn't see any pins. If they had any pins, I couldn't say yes or no.

Q. Did you have anything to do with putting those hooks on yourself? A. Yes.

Q. What did you do?

A. Just slapped them on. The door had the flange and we just slapped the hook on.

Q. Did these doors have one or two hooks to hold them?

A. One, I think, on each side. I don't know if they had a fore end and an after end, but each door had a hook on. I know that much.

Q. With reference particularly to the hatch door for the port cover of the No. 4 hatch——

A. I didn't hear that.

Q. I say referring now particularly to the port cover of the No. 4 hatch. A. The port side?

Q. Yes.

A. Well, the port side, when we opened the hatch, the cover, [58] it was filled up with cans right to the top. We couldn't get in the hatch. We couldn't get in there. We crawled on our belly under the doors to get down there. And then they said we were going to get what we call the scows, the slingboards. I said, "Oh, oh," to myself. "I am going home if they are going to use the scows."

Q. When you say if they are going to use the scows, what are you talking about?

A. Then I went on the deck.

(Testimony of Joseph Kokicks.)

Q. Wait. I don't understand you. I don't know whether the Court does.

A. That is a slingboard, what is called scows.

Q. That is a board——

A. It is bigger than a regular board, much bigger.

Q. What is the purpose of it?

A. About five feet wide and about six, a little over, long.

Q. Five feet wide and six feet long?

A. Yes.

Q. What is that used for and how is it used?

A. They have hooks on the four corners.

Mr. Kay: Your Honor, there were no cargo boards used here and we are wasting a lot of time. I object to this on the ground it is incompetent, irrelevant and immaterial.

Mr. Licking: Let's see. The other witness testified that there was some colloquy about the use of these boards rather [59] than slings.

Mr. Resner: What difference does this make? This was not at the time of the accident.

Mr. Licking: It may make some difference. This was before the accident.

Mr. Resner: It is too remote.

The Court: Well, it is a new element in the case. I know nothing about it. I do not know what relation it has to the accident itself.

Mr. Licking: If the Court please, I merely intend to ask him if he used the boards. If they used the boards or refused to use them and they used nets.

(Testimony of Joseph Kokicks.)

The Court: Ask him directly.

The Witness: We didn't use it that way. If they used it, I would walk off the job. But we didn't use it. I went to the dock looking for the walking boss. I said, "If they are——"

The Court: They did not use the boards, Mr. Licking. Let's get along.

Mr. Licking: They did not use the boards on that shift, your Honor, that is true.

The Witness: I said, "If they are going to use the scows——"

Q. (By Mr. Licking): You did not use the boards on that shift?

A. No, we didn't use them.

Q. What did you use? [60]

A. I said, "We are going to use the nets."

Q. Did you use the nets?

A. Yes, we used——

The Court: He used the nets.

The Witness: And then——

The Court: You have answered the question.

Q. (By Mr. Licking): Did you work on the port side at all of the hatch?

A. Nobody worked on the port side.

Mr. Licking: That is all.

Mr. Kay: No questions.

Mr. Resner: I have no questions.

MARTIN O'SHEA

was called as a witness on behalf of the respondent, United States of America, and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Martin O'Shea.

Direct Examination

By Mr. Licking:

Q. Mr. Shea, calling your attention particularly to the date about May 28, were you working for the Arrow Stevedoring Company then?

A. Yes, sir.

Q. Do you recall an accident having happened that day? [61]

A. Yes, a bad one, too.

Q. Do you recall what ship that was on?

A. The Edgecomb, I think it was.

Q. Do you know Mr. Bowers, who was on the stand here before you?

A. Yes.

Q. What was your position?

A. My position was day walking boss.

Q. As such, when you came on the job, did you see Mr. Bowers?

A. Yes, I seen Bowers.

Q. Did you have any conversation with Mr. Bowers?

A. Yes, he gave me——

Q. I beg your pardon. I just asked you if you had any conversation with him.

A. Yes.

Q. Did you have any conversation with particular reference to the hold in which this accident afterwards occurred?

A. No.

(Testimony of Martin O'Shea.)

Q. He did not talk to you at all about that?

A. None in the world, not a word said concerning the accident.

Q. Pardon?

A. He didn't say a word about that hold.

Q. He did not say a word about the hold where the accident happened? A. No.

Q. Did you yourself look at the hold? [62]

A. Went through the alleyway and saw the side ports up, and I presumed it was safe to work.

Q. You say you went through the alley?

A. You could see the boards.

Q. On the alleyway?

A. The alleyway 'tweendecks. You can look through and see the boards.

Q. 'Tweendecks. How far were you above the top of the hatch covering No. 4 hold?

A. Ten or fifteen feet, something like that.

Q. Did you look down there?

A. No, you can't look down from there, but you can just see the sideboards are up and you figure it is safe.

Q. From that position can you see whether they are safe or not?

A. Well, you understand any time those things is lifted up they are supposed to be safe. Otherwise they won't be up. They are supposed to be secured.

Q. It is the job of the person who lifts them to see that they are secured? A. Yes.

Mr. Kay: Your Honor, it depends on the particular situation.

(Testimony of Martin O'Shea.)

Q. (By Mr. Licking): How long have you been a stevedore? A. Oh, about 30 years. [63]

Q. As I understand it, you did not make any personal examination of this hatch cover where the accident afterwards happened?

A. No. It happened so quick I had no time to do anything.

Q. That happened soon after your gang came on the ship?

A. The gang came on at 7:00 o'clock. It happened about ten minutes past seven.

Q. You did have a conversation with Mr. Bowers that morning?

A. Yes, that morning, but he didn't say nothing about it not being safe.

Q. He didn't say anything about that hold at all?

A. No, not a word.

Q. Did he tell you he had opened it during the night? A. The boat was.

Q. Did he tell you he had opened it during the night? A. The boat was open.

Q. I didn't ask you that. I asked you did Bowers tell you he had opened that?

A. No, he didn't tell me he opened it. It was opened. That is all I know. I don't know who opened it, the stevedores or the Navy.

Q. It was open when you got there?

A. Yes, sir.

Q. You did not make any examination of it yourself to see whether it was safe? [64] A. No.

(Testimony of Martin O'Shea.)

Q. Why didn't you make an examination?

A. They worked already there.

Q. What?

A. They worked in that hatch all night, so why should I make an examination? It was up. The port side was up already.

Q. You assumed, since it was up, that it was safe?

A. It is always safe when it is up and it is secured. The Navy never opens those things up unless they make it secure and safe.

Q. Do you know whether the Navy opened it or not?

A. I don't know. I presume they opened it. They open it in the daytime because in the daytime I seen them; the Navy did it. I don't know whether they did that night or not.

Q. You do not know who opened it?

A. I don't know. It was open in the morning when I came in.

Q. You do not know then who opened it?

A. I don't know even yet who opened it because I wasn't there.

Q. You didn't take a look at it to see if it was safe or not?

Mr. Kay: That is objected to as asked and answered. These witnesses are his.

Mr. Licking: These witnesses are mine to a remarkably limited extent.

Mr. Resner: You called him, Mr. Licking.

Mr. Licking: Yes, I did. [65]

(Testimony of Martin O'Shea.)

The Court: Suppose you go ahead. It is getting late.

Mr. Licking: The question seemed to me to be perfectly proper.

The Court: Read the question.

(Question read by the Reporter.)

The Court: I think the witness has answered that question.

The Witness: Yes.

Q. (By Mr. Licking): Your answer is you did not look?

The Court: He said he saw the covers were up and he presumed it was safe. Being up, he went ahead with his work.

Q. Isn't that right?

A. That is right. When they are open they are safe. That has been the practice all the way through. We don't make an examination unless somebody told me.

Q. (By Mr. Licking): You say that is your practice. Do you mean that is stevedore practice?

A. When you see those ports open——

Q. That is stevedore practice?

Mr. Kay: Allow the witness to answer.

Mr. Licking: I thought he had finished.

Q. You are talking about stevedore practice?

A. When they are up there secured, they are supposed to be able to work them without any danger to anybody.

(Testimony of Martin O'Shea.)

Q. That is proper practice: the duty of seeing that they are secure, is that on those who raise them? [66]

A. That's it. Don't touch them.

Q. In other words, whoever raises the hatch cover has the duty to see that it is safe?

A. Secured.

Q. And you relied on the fact that whoever raised it had secured it? A. Had secured it.

Mr. Licking: That is all.

Cross-Examination

By Mr. Kay:

Q. Mr. O'Shea, had you worked a number of Navy ships? A. Oh, quite a few.

Q. And on all these Navy ships does the Navy allow you to go around and check everything on the ship?

A. No, they check themselves. Everything is checked by the Navy.

Q. Yes, and there is very little you do——

A. Very little.

Q. Just a minute. There is very little you do in the way of going around and checking every particular piece of equipment on a Navy ship, isn't that right? A. That is right.

Q. The Navy does all of that? A. Yes.

Q. They set up the rigging for you? They generally open the [67] hatches for you?

A. They do.

(Testimony of Martin O'Shea.)

Q. And then you do not go around to see if every hook is in place and every pin is in, do you?

A. Surely not.

Q. In your duties among Navy ships that is not a part of them, is it?

A. Any time you want anything done you ask the officer on deck and he tells the sailor to do it.

Mr. Licking: I object to that.

Q. (By Mr. Kay): On these Navy ships, it is not your practice and it never has been to go around and examine all the hooks and pins and all the rigging there? A. No.

Q. The Navy is supposed to do that before you ever get on that?

A. Before we ever get started.

Mr. Licking: I object to that.

The Court: Objection sustained as to what the Navy is supposed to do.

Q. (By Mr. Kay): What time did you go on that ship?

A. A little after 6:00. The night gang was gone already, and I relieved the night gang before. I usually get down about quarter past six. He shows me around, tells me what hatch they're working. When the gang comes down at 7:00 o'clock, call them in. [68]

Q. How many hatches were on this ship?

A. There were five hatches on that type of ship.

Q. How many were you working at this time?

A. During the night?

Q. No, when you went on.

A. Four hatches.

(Testimony of Martin O'Shea.)

Q. As walking boss, you had to cover that whole area? A. The whole area.

Q. You go around and make an inspection that you feel is proper? You take a look at things?

A. That is right. On commercial ships we do that possibly, but on Navy we seldom do. The Navy takes care of that. There are men to watch it, secure guys, boom, and what not.

Q. The practice on Navy ships is you hardly look at any of their equipment?

A. That is right.

Q. In the commercial ships you take more complete charge? A. Yes.

Mr. Kay: That is all.

Cross-Examination

By Mr. Resner:

Q. Mr. O'Shea, after the accident you saw that one of these hooks was bent and the pins were missing, didn't you?

A. Yes, the safety engineer was down, examined, took pictures, and one was out of proportion.

Q. One was bent and a pin was missing?

A. Yes. To secure properly we had to use a turnbuckle. I don't know whether you people know what a turnbuckle is. Kind of hooks, and chains. Lashed it down. The Navy did that after the accident.

Q. After the accident they lashed it?

A. Yes, after the accident they lashed it with turnbuckles.

(Testimony of Martin O'Shea.)

Q. After the accident?

A. Sure. They always do that after the accident, of course.

Mr. Kay: Mr. Licking, were some pictures taken by the Navy? It would help the Court, I think, if you had them.

Mr. Licking: What do you mean?

Mr. Kay: The witness said some pictures were taken down there.

Mr. Licking: He said something about some safety engineer.

Q. (By Mr. Kay): Were pictures taken down there?

A. Yes, they measured them and everything.

Mr. Licking: He didn't say anything about the Navy taking the pictures.

The Witness: That was the Navy.

Mr. Licking: There was a witness in the other case that did take them.

Q. (By Mr. Kay): Were some pictures taken there, Mr. O'Shea?

A. I believe so. They measured those things. It is so long ago, you know. [70]

Q. (By Mr. Licking): Two years ago this happened. Mr. O'Shea, it is a fact, isn't it, that you relied on the custom and practice and on what is proper stevedoring practice that the hatches being raised had been secured by whoever raised them?

A. That is right.

Mr. Kay: I object to that on the ground it is leading and suggestive and not proper redirect examination.

Mr. Resner: If your Honor please, he is cross-examining his own witness.

Mr. Licking: May I have the question read?

(Question read.)

Mr. Kay: We will ask that the answer——

The Court: Let the question and answer stand. Proceed.

Mr. Licking: That is all.

Mr. Kay: That is all.

Mr. Licking: The same contract was in force and effect in this case that was in force and in effect in the other case.

Mr. Kay: That is correct.

Mr. Licking: I have here a copy.

The Court: Is that the contract the Supreme Court refused to construe?

Mr. Licking: No, it is not, but it is similar.

Mr. Kay: It is not similar at all.

Mr. Licking: I hope we do not have to go into that argument. This is the contract that was in force and effect. [71]

The Court: Let that be marked in evidence.

Mr. Licking: There is a gentleman down here who furnished it to me. This gentleman has custody of the records.

The Court: Let it be marked subject to correction, and if it is not correct let us know.

(The contract in question was thereupon received in evidence and marked Respondent United States Exhibit A.)

Mr. Licking: If the Court please, that is the government's case.

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 72 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: No. 11880. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Arrow Stevedoring Company, a Corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division.

Filed March 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,880

UNITED STATES OF AMERICA,

Appellant,

vs.

ARROW STEVEDORING COMPANY, a Corpo-
ration,

Appellee.

PETITIONER'S STATEMENT OF POINTS
INTENDED TO BE RELIED ON ON AP-
PEAL AND DESIGNATION OF PORTION
OF RECORD TO BE PRINTED

Petitioner adopts as points on appeal the Assignments of Error included in the Transcript of Record on file herein.

Petitioner designates for printing the entire Transcript of Record on file herein except that, as to the Exhibits, the same may be considered by the Court in their original form.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Proctors for Appellant.

[Endorsed]: Filed Mar. 29, 1948.

